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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,

Petitioner,

v.

GENE SLAGLE, INC.,

and

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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GENERAL TELEPHONE COMPANY OF OHIO,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner General Telephone Company of Ohio respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio (the "Court below"), in the case of *Gene Slagle, Inc.* v. *Pub. Util. Comm.*, which reversed a decision of the respondent Public Utilities Commission of Ohio (the "PUC").

Opinions Below

The Entry of the PUC which was reversed by the Court below is not reported and is printed in the Appendix

hereto, *infra*, p. 32a. The opinion of the Court below, printed in the Appendix hereto, *infra*, p. 38a, is reported as *Gene Slagle, Inc.* v. *Pub. Util. Comm.*, 41 Ohio St. 2d 44, 322 N.E.2d 640 (1975). The order of the Court below denying rehearing, April 17, 1975, is not reported and is printed in the Appendix hereto, *infra*, p. 52a. The Entry of the PUC pursuant to the mandate of the Court below is not reported, and is printed in the Appendix hereto, *infra*, p. 53a.

Jurisdiction

The decision of the Court below was entered on January 29, 1975. (App. 38a) The order of the Court below denying rehearing was entered on April 17, 1975. (App. 52a) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Does a State deprive a public utility of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution when it requires such public utility, which has successfully appealed to the State Supreme Court from an inadequate rate increase order of the Public Utilities Commission, to give up the rate relief granted by the Commission and to charge confiscatory rates in effect prior to such rate order, on the ground that the reversal of the rate order reinstated such prior rates by operation of law?

Constitutional Provision Involved

Fourteenth Amendment, United States Constitution, §1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case

On April 9, 1970, the petitioner filed an application with the PUC for authority to increase its rates. On August 17, 1971, the Commission issued an order authorizing a rate increase, having found that the existing rates were insufficient to provide petitioner with a reasonable compensation and return. This finding was not challenged by any of the parties and intervenors. However, petitioner appealed to the Court below on the ground that the rate of return fixed by the Commission was unlawful and confiscatory. On June 21, 1972, the Court below reversed the order of the Commission and remanded the cause for compliance with its decision. *General Tel. Co. of Ohio* v. *Public Utilities Comm'n*, 30 Ohio St. 2d 271, 285 N.E.2d 34 (1972). The rates appealed from remained in effect pending the Commission's decision on remand.

On September 5, 1973, respondent Slagle filed a complaint with the PUC against the petitioner, alleging that reversal of the Commission's order of August 17, 1971, voided the rate increase authorized therein, and that the petitioner violated the law of Ohio by continuing to charge such rates. (App. 24a) The complaint sought damages in the amount of more than $6 million, trebled. The Commission dismissed the complaint (App. 32a), but on appeal the Court below reversed. In its decision, the Court below stated that ". . . General Telephone should not have continued to collect rates pursuant to an order which was unlawful and which had been reversed by this court" (41 Ohio St. 2d at 46, 322 N.E.2d at 641) and held as follows (*ibid*):

> "It is our conclusion that when the order of August 17, 1971, was reversed by this court, the increased rates pursuant to such order could no longer be law-

> fully charged, and those rates in effect prior to the above order were reinstated by operation of law, and continued in effect until further order of the commission." (App. 41a)

Since this decision represented a new and unanticipated construction of state law conflicting with previous decisions of the Court below, petitioner filed a motion for rehearing on the grounds that its decision reinstated confiscatory rates in violation of the Fifth and Fourteenth Amendments of the United States Constitution (App. 49a) and deprived petitioner of procedural due process in that it rendered illusory a utility's right of appeal. (App. 50a) The federal constitutional issue was thus timely raised. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). On April 17, 1975, the Court below issued an order denying rehearing. (App. 52a)

A class action law suit based upon the decision of the Court below has already been filed to recover the difference between the rates fixed by the Commission and the prior rates held to have been reinstated by operation of law. Treble damages in excess of $152 million are being claimed.

Reasons for Granting the Writ

The decision of the Court below presents a novel aspect of an important question of federal constitutional law in the field of public utility rate regulation not theretofore determined by this Court. The decision below is unprecedented and in effect insulates unlawful commission decisions granting inadequate rate relief from appeal. No public utility can afford to appeal a rate order if success of the appeal means the loss of the limited rate relief granted by the order for an indeterminate future period.

During that period the decision below condemns utility companies to suffer undisputed confiscation. It is clear that the rule announced by the Court below, if allowed to stand, will have a devastating effect on the financial integrity of public utility companies in Ohio, and may spread to other jurisdictions.

The decision of the Court below is the final judgment of the highest State court in which a decision can be had. The rates established by the decision are final rates for the period during which they are effective. The finality of this decision is also shown by an entry of the PUC dated June 10, 1975 (App. 53a), denying petitioner a hearing on the merits of respondent's complaint on the strength of the Court's "mandate," which the Commission construes as "decisive of all issues raised by Complainant." (App. 55a) This cause in its present posture has all the elements of finality found controlling in *Cox Broadcasting Corp.* v. *Cohn*, ——U.S. ——, 95 Sup. Ct. 1029 (1975); the judgment of the Court below on the federal issue is not subject to further state review; while petitioner may prevail in further proceedings on nonfederal grounds, there would be no trial at all but for the erroneous decision of the Court below; the litigation would be terminated by a Supreme Court decision on the merits of the federal question; and failure now to decide the federal question will leave other utilities similarly situated operating under sanctions of dubious constitutionality.

While the actual holding of the Court below is novel, indeed unique, the effect of the decision is clearly in conflict with the applicable decisions of this Court.

1. *The Decision Below Deprives Public Utilities of their Property without Due Process of Law*

Ever since the beginning of public utility rate regulation, the decisions of this Court have applied the rule that the enforcement of public utility rates which are not sufficient to yield a reasonable return deprives the company of its property in violation of the Fourteenth Amendment. *Bluefield Waterworks & Improvement Co.* v. *Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923); *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U.S. 662 (1935). In cases where a company appeals from a partly favorable rate order, the prior rates are concededly confiscatory for the commission could not have granted any rate increases without a finding that the pre-existing rates were insufficient to yield a reasonable return. In the instant case, the PUC expressly so found. (App. 2a) This finding was not challenged in the Court below and stands uncontroverted. Thus, if the law of Ohio is to the effect that the reversal of a partly favorable rate order reinstates the rates in effect prior to such order by operation of law, even though the confiscatory nature of such prior rates is undisputed, it is clearly violative of the Due Process Clause of the Fourteenth Amendment.

The fact that under the decision of the Court below the prior confiscatory rates are reinstated only "until further order of the commission" does not remove the constitutional infirmity. The Constitution does not permit confiscation even for a single day. In *Prendergast* v. *New York Tel. Co.*, 262 U.S. 43, 49 (1923), this Court held that confiscatory temporary rates, effective pending final determination by the commission, must be enjoined, saying:

> "Nor did the fact that the orders of the Commission merely prescribed temporary rates to be effective until its final determination, deprive the Com-

> pany of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined."

The constitutionally required rule is stated as follows in 73 C.J.S. *Public Utilities* §15 (1951):

> "When rates established by the state or under its authority are set aside or otherwise become of no effect, a public utility has the right to establish its own rates, subject to the ordinary requirements of reasonableness. A rate so established by the utility is in force until it is modified or a different rate is fixed by proper authority."

In the absence of an adequate state remedy, the federal courts have consistently enjoined confiscatory rates and permitted public utilities to establish reasonable rates pending the prescription of valid rates by the regulatory commission. In *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290 (1923), the commission had denied an application for a rate increase and the Supreme Court of Oklahoma, on appeal, refused a supersedeas. This Court reversed a denial of an injunction by the district court, saying (at 293):

> ". . . if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they are now limited. They have done all

that they can under the state law to get relief and cannot get it. If the Supreme Court of the State hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost before the Court shall have acted."

The state courts have also uniformly applied the rule that when a rate order has been set aside, public utilities may establish reasonable rates until other lawful rates are promulgated by the regulatory agency. *Arizona Corporation Comm'n* v. *Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 228 P.2d 749 (1951); *Southern Bell Tel. & Tel. Co.* v. *Georgia Public Serv. Comm'n*, 203 Ga. 832, 49 S.E.2d 38 (1948); *Public Serv. Comm'n* v. *Indiana Bell Tel. Co.*, 232 Ind. 332, 112 N.E.2d 751 (1953); *Hutchinson* v. *Hutchinson Gas Co.*, 125 Kan. 346, 264 Pac. 68 (1928); *Southern Bell Tel. & Tel. Co.* v. *Tennessee Public Service Comm'n*, 202 Tenn. 465, 304 S.W.2d 640 (1957); *City of Tyler* v. *Television Cable Service*, 481 S.W.2d 166 (Tex. Civ. App. 1972).

In departing from this rule and imposing confiscatory rates on public utilities who have successfully appealed from a rate order, the Court below has adopted a rule of law which is clearly violative of the Due Process Clause of the Fourteenth Amendment.

2. *The Decision Below Deprives Public Utilities of their Constitutionally Protected Right of Appeal from Public Service Commission Rate Orders*

Under the decisions of this Court public utilities have a constitutionally protected right of judicial review of rate orders alleged to be confiscatory. In *Wadley Southern Ry.* v. *Georgia*, 235 U.S. 651, 660 (1915), the Court said:

"For rates made by the general assembly, or administrative orders made by a commission, are both legis-

lative in their nature . . ., and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution."

To the same effect is *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920), where the Court said (at 289):

". . . if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

The decisions of this Court also establish that a state violates this constitutional rule if it burdens the right of appeal with onerous conditions. In *Ex parte Young*, 209 U.S. 123, 147 (1908), the Court said

"A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional."

And in *Wadley Southern Ry.* v. *Georgia*, *supra*, the Court said (253 U.S. at 661):

". . . the right to a judicial review must be substantial, adequate, and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders

of uncertain legality rather than to ask for the protection of the law."

The decision of the Court below clearly has the unconstitutional effect referred to in the above cases. Indeed, the consequences of the decision are even more aggravated than those consistently condemned by this Court. In the above-cited cases, this Court held unconstitutional penalties imposed on an appellant in the event that he is unsuccessful. Here, the penalty is imposed on an appellant only if his appeal is successful. If the order appealed from is reversed, the appellant loses the partial rate relief granted by the order and must return to pre-existing confiscatory rates. Thus, the appellant utility company will suffer irreparable financial injury, in the instant case millions of dollars, if it prevails on appeal. Any rule of law that imposes such a penalty on a meritorious appeal offends due process even more than the provisions involved in the earlier decisions of this Court. It makes the right to judicial review completely illusory, for utility companies cannot help but conclude that it is better to yield to commission orders they believe to be unlawful than to ask for the protection of the law and suffer the devastating penalty in the event their appeal is successful and the order is reversed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

General Telephone Co. v. *Pub. Util. Comm.*, 30 Ohio St. 2d 271, 285 N.E.2d 34 (1972)

Statement of the Case

GENERAL TELEPHONE CO. OF OHIO, APPELLANT, *v.* PUBLIC UTILITIES COMMISSION OF OHIO, APPELLEE

[Cite as General Telephone Co. v. Pub. Util. Comm. (1972), 30 Ohio St. 2d 271.]

Public Utilities Commission—Determination of utility rate of return—Appeal—Evidence—Order of commission insufficient, when—Reasons for decision insufficiently detailed—Order of commission reversed, when—Remand to commission.

In a public utility rate case, if the Public Utilities Commission has not set forth in its order the reasons prompting its decision in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commission reached its decision, the order will be set aside, and the cause remanded to the commission, with instructions to set forth the reasons prompting its decision.

(No. 71-712—Decided June 21, 1972.)

APPEAL from the Public Utilities Commission of Ohio.

On April 9, 1970, appellant, General Telephone Company of Ohio, filed an application with the Public Utilities Commission for authority to increase its rates and charges. Sixteen municipalities, several townships and the President and the Board of Trustees of Ohio University were granted leave to intervene.

On December 8, 1970, the staff of the commission filed its report, recommending a statutory rate base of $182,-

039,769 for a date certain of June 30, 1969, and indicating that appellant's present rates produce a return of 5.96% on that statutory rate base. Objections to the staff's report were filed by interveners and by General.

Testimony was heard by the commission, and on April 20, 1971, General and the active interveners, with the exception of Ohio University, jointly presented a stipulation and recommendation to the commission.

On August 17, 1971, the commission issued its opinion and order in which it declined to accept the stipulation and recommendation. The commission determined appellant's statutory rate base to be $182,508,351; that its current revenues and expenses resulted in a rate of return of 5.67%; that such rate of return is insufficient to provide appellant with a reasonable compensation and return; that appellant is entitled to a rate of return of 6.95%, yielding a dollar amount of return of $12,684,330; and that appellant is authorized to establish rates that would produce an annual increase in revenue of $4,698,886.

Appellant filed an application for rehearing on September 3, 1971, which was granted for the purpose of reviewing the rate structure to produce the additional revenues authorized by the order of August 17, 1971, and which was denied in all other respects.

Because of the economic stabilization act of 1970, as amended, and federal orders pursuant thereto, the new rates were not to be effective until November 16, 1971.

Appellant filed its notice of appeal with the commission and with this court on November 10, 1971.

The cause is before this court pursuant to an appeal as a matter of right.

Messrs. Power, Jones & Schneider and *Mr. John Robert Jones*, for appellant.

Mr. William J. Brown, attorney general, and *Mr. Thomas P. Michael*, for appellee Public Utilities Commission.

Messrs. Steer, Strauss, White & Tobias and *Mr. Theodore K. High*, for intervener-appellees.

STERN, J. Appellant contends that the commission erred in computing the rate of return to which it is entitled, in that (1) the commission determined the dollar amount of return prior to determining the rate of return, and (2) that such determination was based on the actual capitalization of the utility rather than the statutory rate base.

This court, in *Cleveland* v. *Pub. Util. Comm.* (1956), 164 Ohio St. 442, set forth six steps which the commission must follow in a rate case of this nature. We are concerned herein with the first three steps, which in substance are as follows:

1. Statutory Rate Base: Determine the dollar amount of a date certain of the reconstruction cost new less existing depreciation of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed.

2. Rate of Return: Determine what percentage will represent a fair annual rate of return on the property so used and useful in rendering such public utility service, as will thereby represent a yearly reasonable compensation for the service rendered.

3. Dollar Amount of Return: Determine the dollar annual return to which the utility is entitled by applying the rate of return percentage against the dollar amount of the statutory rate base.[1]

[1] The remaining three steps are: (4) Annual Expenses: Determine the dollar amount of the cost of rendering the public utility

To hold that the rate of return must be firmly determined without reference to the dollar amount of return which it will yield, would be to deny the commission the use of meaningful working figures.[2] The commission must, therefore, be permitted to simultaneously determine steps 2 and 3 in its endeavor to arrive at a yearly reasonable compensation for the services rendered.

The commission may not, however, *determine or test* a rate of return or a dollar amount of return by referring to the actual capitalization of the utility involved. As stated in *Cleveland* v. *Pub. Util. Comm., supra,* at 444:

"* * * under the Ohio statutes and the decisions of this court, the percentage return is to be related not to the 'total capitalization' or to the 'net investment' but to the statutory rate base (reconstruction cost new less depreciation) so that *neither the actual capital of or net investment in this public utility nor its actual earnings requirements are really material* in a proceeding of this kind. Any such method of *determining or testing* the dollar amount of return as that which is advanced by appellants would eliminate any need at all for determining the statutory rate base. The reasons advanced in support of such arguments have previously been considered and rejected as unsound

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service for a particular year. (5) Allowable Gross Revenues: Add the dollar amount of return to the annual expenses. (6) Rates: Fix rates for the service rendered which would have provided the public utility for the particular year with an amount equal to such allowable gross revenues.

[2] As stated by Judge Gibson in his dissenting opinion in *Ohio Fuel Gas Co.* v. *Pub. Util. Comm.* (1963), 174 Ohio St. 585, 601: "as a matter of mathematics the percentage figure representing the rate of return is merely a means of showing the relationship between the reproduction cost new less depreciation value of utility property and the dollar return realized or to be realized thereon."

by this court. * * * " See *Lima Telephone & Telegraph Co.* v. *Pub. Util. Comm.* (1918), 98 Ohio St. 110; *Lindsey* v. *Pub. Util. Comm.* (1924), 111 Ohio St. 6; *East Ohio Gas Co.* v. *Pub. Util. Comm.* (1938), 133 Ohio St. 212; *Marietta* v. *Pub. Util. Comm.* (1947), 148 Ohio St. 173; *Cleveland* v. *Pub. Util. Comm., supra* (164 Ohio St. 442); *Ohio Fuel Gas Co.* v. *Pub. Util. Comm.* (1960), 171 Ohio St. 10; *Ohio Edison Co.* v. *Pub. Util. Comm.* (1962), 173 Ohio St. 478; *General Telephone Co.* v. *Pub. Util. Comm.* (1963), 174 Ohio St. 575; and *Kenton* v. *Pub. Util. Comm.* (1965), 3 Ohio St. 2d 71.

Appellant's contention that the commission improperly referred to the actual capitalization of the utility rather than its statutory rate base in determining the rate of return stems from the following language from the order of the commission:

"A rate of return of 6.95% applied to the rate base of $182,508,351 produces an allowed dollar return of $12,684,330. Applicant's witness aforesaid has determined that applicant's annual cost of debt is $5,766,700 and the annual dividend requirement of preferred stock is $480,731, a total of $6,247,431. Deducting these fixed charges from the allowable return of $12,684,330 leaves an amount of $6,436,899 available for common equity. This represents a rate of return on common equity of 10.37% which is within the limits of the return on average book equity for twelve other General Telephone operating companies (Meyer Exhibit 1, Schedule 7). Based on applicant's 1,920,000 outstanding common shares the earnings per common share will be $3.35. If applicant continues the annual dividend on common stock in effect for many years of $2.50 per share, the payout ratio would be less than 75%. Thus applicant would be able to retain a reasonable amount in the

business to provide for contingencies and additional funds for plant investment."

Appellant's uncontested interpretation of the above language is that the commission related the dollar amount of return on common equity to appellant's actual capitalization of $171,346,000[3] rather than the computated statutory rate base.[4] ($182,508,351.) Such a procedure attributes the entire $11,162,351 difference (statutory rate base minus capitalization) to an increase in equity, and does not comply with law of Ohio.

A rate of return cannot be justified by testing it against the actual capitalization, and although it is contended that the use of the statutory rate base, rather than actual capitalization, gives a utility an excessive actual return, the remedy for this situation lies in the legislative branch of the government and not in the courts. See *Marietta* v. *Pub. Util. Comm., supra* (148 Ohio St. 173, 183).

Furthermore, the above quoted language from the order of the commission (pertaining only to the rate of return on common equity), is the only portion of the commission's order which provides any substantive indication of the procedure actually used in determining the rate of return or

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[3] Appellant's capitalization was set forth as follows:

Common Equity	$ 62,077,000
Preferred Stock	10,201,000
Mortgage Bonds	84,068,000
Debentures	15,000,000
Total	$171,346,000

[4] Appellant contends that the actual return on equity would be only 8.79% rather than 10.37%. Appellant arrives at this figure by subtracting the sum of $99,068,000 of debt and $10,201,450 of preferred stock from the statutory rate base, and dividing the commission's computed amount available for equity ($6,436,899) by the remainder ($73,238,901).

dollar amount of return. The only evidence found in the record pertaining to the rate of return is that provided by appellant, and although the commission is not bound to follow appellant's recommendations, it must show the reasons prompting the decisions arrived at.

The commission contends that the quoted language was intended only to illustrate the effects its determination would have on the actual capital of the utility, and that the remainder of the opinion and order indicates that the procedure set out in *Ohio Edison Co.* v. *Pub. Util. Comm.*, *supra* (173 Ohio St. 478, 489), was properly followed in arriving at the rate of return and the dollar amount of return. As previously pointed out, a rate of return cannot be justified by testing it against the actual capitalization. Further, having examined the entire order, we find no additional satisfactory explanation of the procedure used by the commission.[5]

The commission contends further that its failure to specifically set forth the reasons explaining how it computed the rate of return is not dispositive, because, no request having been specifically made, the commission could not have *refused* to set forth its reasons. (See paragraph six of the syllabus of *Ohio Edison Co.* v. *Pub. Util. Comm.*, *supra* [173 Ohio St. 478].)

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[5] The only other statement in the order relating to the procedure used by the commission is that:

> "Upon consideration of all the facts of record in this proceeding, including the opinion testimony and exhibits of applicant's rate of return witness, the commission is of the opinion that a rate of return of 6.95% constitutes a fair and reasonable rate of return on the value of applicant's property dedicated to providing telephone services within its operating area. In reaching its determination, the commission has taken into consideration what amount would be reasonably required by applicant to provide for such items as interest on debt, dividends on outstanding stock, and the reservation for surplus."

Upon examination of the record, we find that the issues raised by appellant before the commission were sufficient to require the commission to set forth its reasons. Further, R. C. 4903.09 specifically requires that:

"In all contested cases heard by the Public Utilities Commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions *setting forth the reasons prompting the decisions arrived at*, based upon said findings of fact." (Emphasis added.)

The record being incomplete, no decision as to the reasonableness of the determined rate of return can be made.

We hold, therefore, that where the commission has not set forth in its order its reasons in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commission reached its decision, the order will be set aside.

The order of the Public Utilities Commission is reversed, and the cause is remanded for compliance herewith.

Order reversed.

O'NEIL, C. J., SCHNEIDER, HERBERT, CORRIGAN, LEACH and BROWN, JJ., concur.

Opinion and Order of the Public Utilities Commission of Ohio on remand from the Supreme Court of Ohio, PUCO Case No. 36476, September 29, 1972

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No. 36,476

In the Matter of the Application of GENERAL TELEPHONE COMPANY OF OHIO for authority to increase certain rates and charges, to withdraw its General Exchange Tariff P.U.C.O. No. 5, General and Exchange Tariff P.U.C.O. No. 4 (formerly Troy-Tipp Telephone Inc.), and General and Exchange Tariff P.U.C.O. No. 6 (formerly The New Burlington Telephone Company) and to substitute therefore its proposed General Exchange Tariff, P.U.C.O. No. 7 and to make effective additions and revisions to its General Exchange Tariff P.U.C.O. No. 6.

OPINION AND ORDER

In *General Telephone Co.* v. *P.U.C.* (1972) 30 Ohio St. 2d 271, The Supreme Court reversed the opinion and order of the Public Utilities Commission (hereinafter referred to as Commission or the Commission) issued August 17, 1971, in the matter of the application of General Telephone Company (hereinafter referred to as Company or the Company) for a rate increase in the manner and form prescribed by law. On July 6, 1972, the matter was remanded for compliance with said decision.

Only one syllabus is reported, as follows:

"In a public utility rate case, if the Public Utilities Commission has not set forth in its order the reasons

prompting its decision in sufficient detail to enable the Supreme Court, upon appeal, to determine how the Commission reached its decision, the order will be set aside, and the cause remanded to the commission, with instructions to set forth the reasons prompting its decision."

While the syllabus states the fundamental broad principle regarding the requirements placed upon the Commission in rendering its opinions and orders, we do not construe the mandate pursuant to reversal of the opinion and order in question to require reconsideration of the entire record nor reissuance of an entirely new opinion and order, but rather to require the elimination of that portion of the opinion and order relating the allowed dollar return at a rate of return of 6.95% on the statutory rate base determined by the Commission in the amount of $182,508,351, to the actual capitalization of $172,346,000.

The Company contended further that the Commission had in its opinion and order, digressed from statutory requirements and previous decisions of the Supreme Court in that it determined the dollar amount of return prior to determining the rate of return. The Supreme Court in considering this specification of error, quoted the first three syllabi of *Cleveland* v. *Pub. Util. Comm.* (1956) 1964 Ohio St. 442. The finding of the Commission of the proper statutory rate base not being at issue, Justice Stern, speaking for the Court addressed himself to steps 2 and 3 as previously enumerated by the Court in Cleveland (supra) as follows:

"The commission must, therefore, be permitted to simultaneously determine steps 2 and 3 in its endeavor to

> arrive at a yearly reasonable compensation for the services rendered."

Therefore the rate of return and the dollar amount of the return need not be determined as separate successive steps in a mechanistic formula, but rather rate of return and dollar amount of return may be considered by the Commission as interrelated and subject to the exercise of enlightened judgment so long as the exercise of such judgment is spelled out sufficiently to demonstrate that the results are reasonable and just and are not arbitrary or capricious.

In this case, the only evidence of record relating to one of the factors, rate of return, (syllabi 2 Cleveland supra) was presented by the Company by means of the prepared testimony of Company Witness Meyer. Mr. Meyer is identified as employed by G.T.E. Service Corporation as a Vice President and Director of Revenue and Earnings, said corporation being one of the many affiliated corporations of the General Telephone and Electronics conglomerate. Almost half (1956-current) of his business career has been identified with the General system as such and with telephone companies which have become affiliated with the General system for the remainder of his "more than 30 years" business career.

With respect to this evidence the Court says at 276:

> "The only evidence found in the record pertaining to the rate of return is that provided by appellant, and although the commission is not bound to follow appellant's recommendations, it must show the reasons for prompting the decisions arrived at."

In accordance with the direction of the Court let us examine Witness Meyer's testimony, both direct and on cross-examination.

In connection with his direct testimony the witness made certain corrections to his prepared testimony (testimony of witnesses tendered as experts must under Commission rules be reduced to writing and be filed not less than 10 days before the hearing and be served on all parties of record). The witness (at Tr. page 238) indicated that he had in his original written testimony converted the short term capital (sic) of the Company that was on hand at the end of 1969 to long term mortgage bonds and assumed the cost rate for those mortgage bonds would be not less than 8.75%. At the hearing, the witness indicated that because of "recent rapid change in the securities market" (Tr. page 287) he would have to make some changes, one of which would be to reduce his estimated mortgage bond cost from said 8.75% to 8% (Tr. page 288). This would reduce his over-all rate of return from 8.45% to 8.35% computed on a cost of money basis.

Witness Meyer joined the G.T.E. Service Corporation as Vice President and Director of Revenues and Earnings in 1965, since which time it has been one of his duties to participate in the formulation of rate of return presentations in General system rate cases. For some years prior to 1965 he had similar duties as Vice President—Revenue Requirements for the General Telephone Company of Pennsylvania (Tr. page 291). He has previously testified on behalf of G.T.&E. telephone subsidiaries in the states of Tennessee, Missouri, Nebraska, Virginia and Wisconsin in rate cases concerning fair rates of return. This is his first appearance in that capacity in an Ohio rate case.

We have no quarrel with Witness Meyer's statement of the basis for making a determination of a fair rate of return as set out at the bottom of page 292 continuing to the top of page 293 of the transcript.

The construction budget of the Company projected over a five-year period amounts to approximately $190,000,000.00 at the rate of $38,000,000.00 per year of which approximately $20,000,000.00 per year will be financed by issuance of securities and the balance will be obtained from internally generated funds. The witness does not indicate the proportions of security issues between equity and debt, but it may be assumed that the Company will maintain roughly its current capital structure. This evidence is pertinent only to indicate the contemplated capital needs of the Company and its ability to attract this capital which depends upon a rate of return which will satisfy the needs and desires of prospective investors.

Considering the matter of the cost of debt for this company the witness adopted the generally accepted approach using predominantly the historical or imbedded cost of debt which he calculated at 4.74%. He then, as indicated above, "converted" $21,832,000 representing short-term borrowings, into that amount of First Mortgage Bonds at a cost of 8%. After this "conversion" the "embedded" cost of debt becomes 5.59% or an increase of .85% over the historical cost of debt. It is significant to note that as of January 22, 1971, this projected "conversion" had not taken place, else the witness would have so stated. It would appear that on the basis of this witness's testimony the rate at which the short term notes could be "converted" to long term first mortgage bonds is speculative to say the least. The witness himself changed, as of January 22, 1971, the anticipated cost of debt downward from a rate of 8.75% on January 8, 1971, to 8% at the time of his appearance in this case, as he said due to "the recent rapid change in the security market". If this trend continues, we can anticipate a further reduction in the cost of debt by the time of

the "conversion" of the short term notes to permanent debt financing. There is no sound basis for assuming that the cost of debt would be pegged at 8%. It is to be noted that the prime rate was also declining at the time. (Tr. page 946).

We cannot under these circumstances accept the calculation of the witness that the composite cost of debt should be 5.59%. Furthermore, on cross-examination, after a number of questions relative to much lower cost of debt issues, particularly issues for relatively short periods of five, six or seven years (Tr. pages 934-941), the witness rejected out of hand consideration of such short term permanent financing as follows: (Tr. page 941).

> "The other comment that I would be forced to make is that there are a number of these, * * * all of which are very short term, five, six and seven years, and not suitable for comparison."

Q. "Is that the reason for their not being included in your study?"

A. "That is a reason for not including them, yes. I wouldn't consider them."

It is impossible to understand this witness's unwillingness to consider alternative methods of "converting" the Company's outstanding short term notes in order to hold the cost of debt at the most advantageous rate both for the Company and for its subscribers. As indicated by the record (Tr. pages 934-941) substantial companies have turned to relatively short term permanent financing to minimize the cost of debt securities.

The witness gives no reason for his disregard for this source of funds for the Company other than to say that he "wouldn't consider them."

In response to a line of questions by a Commissioner, the witness agreed that the issuance of such short term bonds would be suitable for some companies but that they have no advantages "in our situation" giving no explanation supporting this conclusion.

On this state of the record this Commission is not persuaded that the embedded cost to the Company of debt securities should be increased to 5.59%.

There can be little question as to the cost to the Company of its issued and outstanding debentures shown as 7.14%. There is no indication on the record that the Company contemplates the issuance of additional debentures in the foreseeable future. As to preferred dividends they are fixed with a composite rate of 4.71% and the record does not indicate any further issuance of preferred stock in the foreseeable future.

Witness Meyer, for reasons set out at transcript pages 298-300 has restricted his comparable risk study to independent telephone companies having a capitalization of $20,000,000.00 or more, General Telephone System companies and certain electric companies.

With respect to the first category, major independent telephone companies other than General companies, the range of the return on equity of the companies selected by the witness was from 10.63% to 12.19% with an average of 11.18%.

The second category, 12 General system telephone companies, the return on equity ranged from 9.6% to 11.8%, with an average of 10.5%.

The third category, certain selected Class A and B electric utilities, earned an equity in the range of 12.3% to 12.8% with the average of 12.6%. With reference to the inclusion of these electric companies for comparative pur-

poses, the witness says at Tr. page 304, "*** I am of the opinion that telephone companies have a greater risk than electric companies and that telephone companies should have returns at least equal to or more than electric companies. ***" We are not enlightened by the witness of the facts upon which he bases this opinion. We may presume, however, that one of the factors is the ability of a telephone subscriber to discontinue service without disastrous results in times of general economic decline as historically occurred in the Thirties. This factor in our view can assuredly be discounted as a measure of risk. The telephone industry is justly proud of the fact that a telephone, nay, several telephones per household, has come to be regarded as a necessity rather than a luxury to be foregone with every shift in the economic winds. Indeed this company is planning a $190,000,000.00 construction program over the next five years to satisfy the increased demands for increased telephone service in the geographical territory it serves. The Company does not appear to be risking the loss of subscribers or a diminution of revenues.

There are many reasons beside this to account for differing rates of return between gas, electric and telephone companies, to mention a few. Some of these factors are geographical territory served, density of customers, state of the respective arts, technological improvements, capital structure, efficiency of management and many more. Witness Meyer did not explain his reasons for the selections he made of "comparable risk" companies in any of the categories above enumerated.

In our analysis, the witness equated the elements making up return on equity to pure interest plus compensation for risk.

This calculation combining categories 1 and 2 above produces a range of return on equity of 11.65% to 15.95% with no average given.

In the last analysis, the main question to be decided under the cost of money, and the cash flow method employed by this witness, is the proper rate of return to be ascribed to the common equity element of the Company capital structure. The preferred dividend rate and the embedded cost of debentures are not susceptible of change. We do not accept the "conversion" of short term notes to permanent long term mortgage bonds at 8%. This then leaves for decision, the appropriate cost of mortgage bonds and adequate rate of return on the common equity portion of the statutory rate base.

The low and high of the rates of return have hereinbefore been noted. The final conclusion of the witness with reference to return on equity was stated in his originally prepared testimony at 13%, the mid-point of his judgment as to the range of return of 12.5% and 13.5% (Tr. page 305). This return on equity is greater than the highest average four-year return on common equity of the 24 independent telephone companies the witness selected for comparative purposes. It is also higher than the four-year average return on common equity of the 12 out of 28 General Telephone operating companies selected by the witness for comparative purposes. In keeping with the witness's opinion that telephone companies should be entitled to a return on equity greater than electric companies because of "greater risk" (hereinbefore discussed) his recommended rate of return on common equity for the Company is slightly higher than the three year average for the unidentified A and B Electric Companies selected by the witness for comparative purposes.

His final original conclusion as to the overall rate of return to satisfy the elements testified to was computed to be 8.5% (Tr. page 305) including the "conversion" of $21,832,000 short term notes to long term mortgage bonds at a cost of 3.5%.

However, Meyer Exhibit No. 1, schedule 13, shows the following calculation:

Capital Component	*Percent of Total*	*Cost or Rate*	*Equated Cost or Rate*
Common equity	36.23%	13.0 %	4.71%
Preferred Stock	5.96%	4.71%	0.28%
Mortgage Bonds	49.06%	5.78%	2.84%
Debentures	8.75%	7.14%	0.62%
Total			8.45%

Apparently the witness rounded off the calculated 8.45% over-all rate of return to 8.5%, for what reason is undisclosed. While this rounding off amounts to only .05% it produces $91,254.18 in additional annual return requiring about twice as much in additional annual revenue, not an unsubstantial amount so far as the Company's subscribers are concerned.

In the corrections made at the time of his testimony January 22, 1971, the witness corrected the "embedded" cost of debt resulting from a reduction of the cost of the so-called "conversion" from 8.75% to 8%. This changed the cost of long term debt from 5.78% to 5.59% with the proportion of the over-all rate of return attributable thereto reduced from 2.84% to 2.74% so that by substituting their figures on Meyer Exhibit No. 1, schedule 13, the following calculation reflects the over-all rate as follows:

Capital Component	*Percent of Total*	*Cost or Rate*	*Equated Cost or Rate*
Common equity	36.23%	13.0 %	4.71%
Preferred Stock	5.96%	4.71%	0.28%
Mortgage Bonds	49.06%	5.59%	2.74%
Debentures	8.75%	7.14%	0.62%
Total			8.35%

Upon cross examination the witness did not change his opinion as to the proper over-all rate of return being 8.5% although on the cost of money calculation above the rate of return is .15% less resulting in additional return over and above cost of money of $273,762.53 annually, or approximately twice this amount in annual revenue, once again no small matter insofar as the Company's subscribers are concerned.

On a cost of money calculation, this rounding off from 8.35% to 8.5% results in an effective rate of return on common equity of 13.4%.

As we understand the Supreme Court's decision in this case, the fatal flaws in the opinion and order of the Commission were the failure to:

(1) Sufficiently analyze the testimony of Company Witness Meyer to justify a finding relative to rate of return and return different to that urged by the witness; and

(2) Recite those factors which the Commission considered in arriving at the rate of return and return allowed in its opinion and order of August

17, 1971, without testing the results in relation to the "actual" capital structure of the Company.

We have not meant herein to impugn the sincerity, or integrity, of Company Witness Meyer, but we do feel compelled under the mandate of the Court to recite in some detail our reasons for our rejection of his opinion that 8.5% represents a fair rate of return for the Company on the statutory rate base. We have not dwelt upon the background and experience of Witness Meyer throughout his business career although we are not unmindful of his current position of Vice President and Director of Revenue and Earnings of General Telephone Electronics Service Corporation.

The Court has pointed out that the opinion and order of the Commission attributes all of the inflated value of the statutory rate base over the net book value of Company's property to the common equity portion of its actual capital structure. (first full paragraph page 275). While counsel for the Commission argued that this was not the inevitable conclusion, since the opinion and order of the Commission did not relate to the rate base in its "testing" of the results of the finding relative to rate of return, counsel's presentation remained argumentative rather than factual.

As indicated above, the cost of preferred stock is fixed as is the cost of debentures and the long term mortgage bonds. These costs have been computed as a part of the "cost of money" as related to the capital structure of the Company without reference to the dollar amount of these securities either actual or as a part of the statutory rate base. We, therefore, accept them for the purposes of this opinion and order.

With reference to the "conversion" of the short term notes into mortgage bonds we do not accept Witness Meyer's unsupported opinion that the only "suitable" financing would be long term mortgage bonds. Even a number of long term mortgage bond issues were at less than the recommended 8% rate. Since the short term notes had not been "converted" to other long term mortgage bonds or short term mortgage bonds (see comment page 3 within) at the time Witness Meyer appeared before the Commission, we believe we are required to exercise judgment in this area and we do so by assigning a cost to the short term notes of 7%, having due regard for all the evidence of record.

We come then to the matter of a reasonable rate of return on equity. Recognizing the desire of the Company to maximize its return and being not unmindful of national objective to restrain inflation the Commission believes it is in the national interest, even more it is directed by the Economic Stablization Plan, to approve rates of return at the lower portion of the range of reasonable rates of return commensurate with the continued financial integrity of the utility without impairing its obligation to render reasonably adequate service. It is our considered judgment that a rate of return of 9.5% on the equity portion of the statutory rate base will produce these results and so find.

On a cost of money basis, the cost or return on the various components of the capital structure of the Company may be stated as follows:

Capital Component	*Percent of Total*	*Cost or Rate*	*Equated Cost or Rate*
Common equity	36.23%	9.5%	3.44%
Mortgage Bonds	36.32%	4.74%	1.72%
Short Term Notes	12.74%	7.00%	0.89%
Preferred Stock	5.96%	4.71%	0.28%
Debentures	8.75%	7.14%	0.62%
	100.00%		6.95%

Each component of the Company's capital structure may be attributed to the statutory rate base of $182,508,351 as follows:

Capital Component	*Percent of Total*	*Dollar Amount of Statutory Rate Base*
Common Equity	36.23%	$ 66,122,775.00
Mortgage Bonds	36.32%	66,287,033.00
Short Term Notes	12.74%	23,251,564.00
Preferred Stock	5.96%	10,877,498.00
Debentures	8.75%	15,969,481.00
		$182,508,351.00

A rate of return of 6.95% on the statutory rate base of $182,508,351 produces a return of $12,684,330 as shown in the August 17, 1971, opinion and order of the Commission.

Opinion and Order of the Public Utilities Commission

We are of the opinion that the dollar return and the rate of return hereinbefore found are reasonable and lawful as more fully explained hereinabove, and constitutes "a yearly reasonable compensation for services rendered", and conforms to the mandate of the Supreme Court.

It is therefore,

ORDERED, That the discussion beginning at the last paragraph on page 10 and ending at the caption "Authorized Rates and Charges" on page 12 of the Opinion and Order, journalized on August 17, 1971, be deleted and the above discussion substituted therefor. It is, further,

ORDERED, That copies of this Opinion and Order be served upon all parties of record along with the Opinion and Order journalized August 17, 1971 attached herewith.

THE PUBLIC UTILITIES COMMISSION OF OHIO

HENRY W. ECKHART, *Chairman*
CARL R. JOHNSON
ELMER A. KELLER

Commissioners

Entered in the Journal
SEP 29 1972

A true copy:

/s/ RALPH E. NUSKEN
Ralph E. Nusken,
Secretary

Complaint of *Gene Slagle, Inc.* v. *General Telephone Company of Ohio, PUCO Case No. 73-655-T*

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No.

In the Matter of GENE SLAGLE, INC., 463 East Center Street, Marion, Ohio 43302 on his own behalf and on behalf of all subscribers of General Telephone Company of Ohio similarly situated,

Complainants,

vs.

GENERAL TELEPHONE COMPANY OF OHIO,
Marion, Ohio,

Respondent.

COMPLAINT

MULDOON, FORD & PEMBERTON
50 West Broad Street
Columbus, Ohio 43215
By David L. Pemberton
and James W. Muldoon

Dated: September 5, 1973

Complaint of Gene Slagle, Inc. v. General Telephone Company of Ohio

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No.

In the Matter of GENE SLAGLE, INC., 463 East Center Street, Marion, Ohio 43302 on his own behalf and on behalf of all subscribers of General Telephone Company of Ohio similarly situated,

Complainants,

vs.

GENERAL TELEPHONE COMPANY OF OHIO, Marion, Ohio,

Respondent.

COMPLAINT

COME NOW Gene Slagle, Inc. and all subscribers of General Telephone Company of Ohio similarly situated (hereinafter called "Complainants"), by their attorneys, and pursuant to Section 1.08 of Chapter I of the Code of Rules and Regulations of the Public Utilities Commission of Ohio, hereby file their complaint against General Telephone Company of Ohio (hereinafter called "Respondent") and in support of same respectfully state the following:

1. That Complainants are subscribers to the telephone service offered and provided by Respondent throughout Respondent's franchised territory in the State of Ohio and have been subscribers to such service during all or a part of the period November 16, 1971 to the date of filing of this complaint.

2. That Respondent is a public utility as defined by Section 4905.02 of the Ohio Revised Code and has, at all times during the period covered by this complaint, operated as such subject to the jurisdiction of your Commission.

3. By application filed with your Commission on April 9, 1970, Respondent sought authority to increase its rates and charges to Complainants by withdrawing its General Exchange Tariff P.U.C.O. No. 5, General Exchange Tariff P.U.C.O. No. 4, and General Exchange Tariff P.U.C.O. No. 6 and substituting therefor its proposed General Exchange Tariff P.U.C.O. No. 7 and certain additions and revisions to its General Exchange Tariff P.U.C.O. No. 6.

4. That said application was docketed by your Commission as Case No. 36,476.

5. On August 17, 1971, your Commission issued an Opinion and Order in Case No. 36,476 wherein your Commission authorized Respondent to establish rates that would produce an annual increase in revenue to Respondent of $4,698,886 based upon the number of subscribers served by Respondent as of the date certain contained in Respondent's April 9, 1970 application.

6. That, pursuant to said August 17, 1971 Opinion and Order, Respondent filed new and revised schedules of rates which became effective November 16, 1971.

7. That Respondent has continuously charged and collected from Complainants and Complainants have paid to Respondent the rates established pursuant to your Commission's August 17, 1971 Opinion and Order.

8. That, subsequent to the issuance of your Commission's August 17, 1971 Opinion and Order and the establishment by Respondent of the schedules of rates authorized therein, Respondent filed an appeal to the Supreme Court of Ohio seeking a reversal of your Commission's August 17, 1971 Opinion and Order.

9. That said appeal was docketed by the Supreme Court of Ohio as No. 71-712 and was the subject of an opinion and order of said Court published as *General Telephone Co.* v. *Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, whereby the Supreme Court of Ohio reversed and set aside the Order of your Commission authorizing Respondent to establish any rate increase and remanded the cause to your Commission for further consideration.

10. That the Supreme Court of Ohio's reversal of your Commission's August 17, 1971 Order nullified and voided the rate increase authorized to Respondent therein and, by operation of law, suspended the schedules of rates filed by Respondent pursuant thereto.

11. That, nevertheless, Respondent has continued to charge and collect and Complainants have continued to pay the rates established by Respondent pursuant to your Commission's August 17, 1971 Opinion and Order.

12. That Respondent has violated and is violating Sections 4905.22, 4905.30, 4905.32, and 4909.17 of the Ohio Revised Code, specifically, and other provisions of the Revised Code generally.

13. That the aforesaid violations of statute, as well as of the rules and regulations of your Commission issued pursuant thereto, have been knowing, wanton, and willful in view of the fact that the order of the Supreme Court of Ohio which nullified and voided Respondent's rate increase was issued at Respondent's request; and Respondent is, therefore, chargeable with actual knowledge of the content of said order and all of the legal consequences deriving therefrom, including the suspension by operation of law of the schedules of rates pursuant to which Respondent has unlawfully collected its charges from Complainants.

14. That, as a direct result of Respondent's unlawful actions, Complainants have incurred actual damages in an amount equal to at least $6,063,183, which sum represents the difference between the legal and effective rates payable by Complainants on and after June 21, 1972, the date of the aforesaid Supreme Court order setting aside and nullifying Respondent's rate increase, and the rates actually charged and collected from Complainants by Respondent after said date.

WHEREFORE, Complainants respectfully urge your Commission to order Respondent to cease and desist from the aforesaid violations of law and to include in said Order the following specific findings of fact and conclusions of law:

FINDINGS OF FACT:

1. That Respondent is a public utility as defined by Section 4905.02 of the Ohio Revised Code and subject to the jurisdiction of this Commission.

2. That Complainants, as subscribers to the Respondent's service, are entitled to bring this complaint and this Commission has jurisdiction to determine the issues set forth therein.

3. That this Commission, by its Opinion and Order entered in the Journal August 17, 1971, did authorize Respondent to establish new schedules of rates which would produce an annual increase in revenue to Respondent of $4,698,866 based on the number of subscribers served by Respondent as of the date certain contained in the application pursuant to which such increase was authorized.

4. That this Commission's August 17, 1971 Opinion and Order, pursuant to which such rate increase was authorized, was reversed and set aside by the Supreme Court of Ohio on June 21, 1972.

5. That Respondent took no action to comply with the Supreme Court of Ohio's June 21, 1972 order, but continued to charge and collect from its subscribers the rates established pursuant to this Commission's August 17, 1971 Opinion and Order.

6. That, further, Respondent took no action to comply with this Commission's subsequent Opinion and Order in Case No. 36,476 entered in the Journal September 29, 1972.

7. That, during the period June 21, 1972 through the present time, Respondent has failed to file or maintain with this Commission a schedule of rates established pursuant to any Order of this Commission warranting Respondent's increased charges to its subscribers.

Complaint of Gene Slagle, Inc. v. General Telephone Company of Ohio

CONCLUSIONS OF LAW:

1. That Respondent is violating and has violated Sections 4905.22, 4905.30, 4905.32, and 4909.17 of the Ohio Revised Code and other provisions of the Ohio law, as well as the rules and regulations of this Commission.

2. That such violations consist in Respondent's charging and collecting rates for which no effective tariff or schedule has been filed or maintained on or after June 21, 1972.

3. That such violations have been knowing, willful, and wanton in view of Respondent's direct participation in all proceedings before this Commission or before the Supreme Court of Ohio affecting the level of rates which Respondent could lawfully charge and collect on and after June 21, 1972 and Respondent's responsibility for the lawful establishment thereof.

4. That Complainants are entitled by law to collect from Respondent all moneys paid to Respondent by its subscribers in excess of the schedules of rates lawfully established by Respondent prior to November 16, 1971 for the period June 21, 1972 to the present date.

5. That the amount to be determined in accordance with Conclusion 4 above shall include a reasonable allowance for the increase in the number of subscribers, if any, served by Respondent on and after the date certain contained in Respondent's April 9, 1970 application in Case No. 36,476.

6. That Complainants are further entitled to collect from Respondent treble damages as provided by Section 4905.61

of the Ohio Revised Code, plus interest on the entire amount at the legal rate of six percent (6%) per annum.

7. That Complainants' attorneys are entitled to reasonable compensation for their services, plus expenses, for prosecuting this complaint in an amount to be fixed by the appropriate Common Pleas Court.

8. That Respondent should be ordered to cease and desist from any further violations of the foregoing statutes or the rules and regulations of this Commission.

Respectfully submitted,

MULDOON, FORD & PEMBERTON

50 West Broad Street
Columbus, Ohio 43215
By /s/ DAVID L. PEMBERTON
David L. Pemberton
and
/s/ JAMES W. MULDOON
James W. Muldoon
Attorneys for Complainants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the foregoing Complaint on John Robert Jones, Esquire, attorney for General Telephone Company of Ohio, this 5th day of September, 1973.

/s/ DAVID L. PEMBERTON
David L. Pemberton

Entry of the Public Utilities Commission of Ohio Dismissing Complaint, PUCO Case No. 73-655-T, January 10, 1974

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No. 73-655-T

In the Matter of GENE SLAGLE, INC., 463 East Center Street, Marion, Ohio 43302 on his own behalf and on behalf of all subscribers of General Telephone Company of Ohio similarly situated,

Complainants,

vs.

GENERAL TELEPHONE COMPANY OF OHIO, Marion, Ohio,

Respondent.

Relative to the respondent allegedly charging and collecting rates for which no effective tariff or schedule has been filed or maintained on or after June 21, 1973.

ENTRY

The Commission, coming now to consider the above-entitled matter, the complaint filed by Gene Slagle, Inc., the respondent's motion to dismiss and memorandum in support thereof, the complainant's motion for an immediate hearing and memorandum in support thereof, the complainant's memorandum contra respondent's motion to dismiss, respondent's reply memorandum in support of motion to dismiss, and contra complainant's motion for im-

mediate hearing, complainant's reply to respondent's memorandum contra complainant's motion for immediate hearing, complainant's motion to strike portions of respondent's reply and memorandum of respondent contra complainant's motion to strike portions of respondent's reply (reply memorandum of respondent in support of motion to dismiss, and contra complainant's motion for immediate hearing, and being otherwise fully advised in the premises, finds:

(1) That complainants have filed a complaint against General Telephone Company of Ohio, the respondent herein, seeking recovery of alleged unauthorized increased rates and in addition thereto treble damages;

(2) That complainant's claim this Commission's Opinion and Order of August 17, 1971, Case No. 36,476, was reversed and set aside by the Supreme Court of Ohio on June 21, 1972 in Case No. 30 Ohio St. 2d 271, *General Telephone Co. of Ohio, appellant, vs. Public Utilities Commission of Ohio, appellee.*

(3) That complainants claim respondent is violating the law in that it is charging and collecting rates for which no effective tariff or schedule has been filed or maintained on or after June 21, 1972;

(4) That the Supreme Court of the State of Ohio in Case No. 30 Ohio St. 2d 271, *General Telephone Co of Ohio, appellant,* v. *Public Utilities Commission of Ohio, appellee* ruled, "We hold, therefore, that where the Commission has not set forth in its Order its reasons in sufficient detail to en-

able the Supreme Court, upon appeal, to determine how the Commission reached its decision, the Order will be set aside. . . . The Order of the Public Utilities Commission is reversed, and the cause is remanded for compliance herewith."

(5) That the effect of a reversal and remand to the Commission for compliance is covered specifically in *The Cincinnati and Suburban Bell Telephone Co.*, 107 Ohio St. 370 (March 27, 1923) the court said:

> The Commission, by reason of the fact that the majority of this court were unable to agree upon the ground of reversal, and therefore limited its judgment to a reversal only, was left in the dark as to the ground or grounds upon which the court based its judgment.
>
> • • • • •
>
> This court, then, having failed to indicate its reason or reasons for reversal, and having limited its order to a reversal and remand for "further proceedings according to law," the Public Utilities Commission upon the receipt of the mandate was in no different situation than it would have been, had it found, while the matter was still before it, that "the rates, joint rates, tolls, schedules, charges, rentals and practices of schedule P.U.C.O. No. 2" were unreasonable or unlawful, in which event it would have been its duty, under Section 614-23 General Code, (now R.C. 4909.15) to "fix and determine the just and reasonable rate . . . to

be thereafter . . . charged, demanded, exacted or collected for the performance or rendition of the service." *Such just and reasonable rate might or might not have been the rate theretofore in force, but the latter would not become the rate automatically.* Both the utility and its patrons would have been entitled to have the judgment of the Public Utilities Commission upon that subject, *and if by reason of changed issues, or for any other cause, it were necessary for the Commission to have further facts upon which to exercise such judgment, it would have been the duty of the Commission to secure such facts,* either by its own initiative or by giving the parties interested an opportunity to produce evidence thereof. *Therefore, when the order of the Public Utilities Commission was reversed by this court, and the cause remanded generally for further proceedings according to law, the cause came again before the Public Utilities Commission for the exercise by it of its judgment, and, if the record before it was not sufficient to enable it to intelligently exercise such judgment, it was its duty to either itself supplement that record or permit the parties interested to make such supplement, and then base its conclusion upon such record.*

The order of the Public Utilities Commission of July 11, 1922, will be reversed, and the cause remanded to the Commission to hear and determine according to law the just and reasonable rate to be charged by the plaintiff in error herein. (emphasis added)

Entry of the Public Utilities Commission of Ohio Dismissing Complaint

The rates, therefore, can be what the Commission considers just and reasonable. The old rates would not become the present rates automatically, and, with the reversal and remand by the Supreme Court, generally for proceedings according to law, the cause is again before the Public Utilities Commission of Ohio for the exercise of its judgment. If the record is not adequate, the P.U.C.O. has a duty to supplement the record or permit parties interested to make such supplement and then arrive at a conclusion.

(6) That the Commission did secure additional information and then issued its Opinion and Order dated September 29, 1972. The Commission gave authority to respondent to file its tariffs November 16, 1971, the day after Phase One (1) of the price stabilization Act ended and in the September 29, 1972 Opinion and Order did not require the respondent to file additional tariffs.

(7) That the Commission has taken all action required of it by the Supreme Court decision of June 21, 1972.

(8) For the reason enumerated above, the motion to dismiss the complaint by the respondent is sustained, thereby disposing of all other motions contained in this proceeding.

It is, therefore,

ORDERED, That the motion to dismiss herein be, and hereby is, sustained thereby dismissing the complaint. It is, further,

Entry of the Public Utilities Commission of Ohio Dismissing Complaint

ORDERED, That copies of this Entry be served, on all interested parties.

THE PUBLIC UTILITIES COMMISSION
OF OHIO

.....
Chairman

CARL R. JOHNSON
SALLY W. BLOOMFIELD
Commissioners

Entered in the Journal January 10, 1974.

A true copy
/s/ BOYD B. FERRIS
Boyd B. Ferris, Secretary
JMW/1b

Gene Slagle, Inc. v. *Pub. Util. Comm.*, 41 Ohio St. 2d 44, 322 N.E.2d 640 (1975)

Statement of the Case

GENE SLAGLE, INC., ET AL., APPELLANTS, *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL., APPELLEES.

[Cite as Gene Slagle, Inc. v. Pub. Util. Comm. (1975), 41 Ohio St. 2d 44.]

Telephone company—Application for rate increase approved—Supreme Court reversed and remand to set forth reasons—Former rates charged, when.

(No. 74-414—Decided January 29, 1975.)

APPEAL from the Public Utilities Commission.

This matter arises out of a prior decision of this court involving appellees herein, General Telephone Company of Ohio and the Public Utilities Commission of Ohio.

On April 9, 1970, General Telephone filed an application with the commission for authority to increase its rates and charges. On August 17, 1971, the commission issued its opinion and order (case No. 36,476) approving a rate increase, but at a lower percentage than that sought by the company. However, due to federal orders pursuant to the Economic Stabilization Act of 1970, the new rates were not effective until November 16, 1971.

Subsequent to the above order of the commission, General Telephone filed an appeal with this court. On June 21, 1972, this court reversed the order of the commission and stated in the syllabus that " * * * if the Public Utilities Commission has not set forth in its order the reasons prompting its decision in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commis-

sion reached its decision, the order will be set aside * * *." *General Telephone Co.* v. *Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, 285 N. E. 2d 34. The cause was therefore remanded to the commission, with instructions to set forth the reasons prompting its decision.

In compliance with that mandate, the commission reissued its opinion and order on September 29, 1972. This order explained the commission's August 17, 1971, decision in greater detail, and had the effect of incorporating substantially all the findings of that determination. Thus, the commission authorized the same rates which it had previously granted, and which General Telephone had maintained since November 16, 1971.

On September 5, 1973, appellants filed a complaint with the commission, alleging, in part, that this court's decision in *General Telephone Co., supra*, reversed the commission's opinion and order of August 17, 1971, and therefore, the utility company should have reverted to charging those rates in effect prior to the November 16, 1971, increase. General Telephone's motion to dismiss the complaint was sustained, and appellants then filed an application for rehearing. After denial by the commission, appellants appealed to this court as a matter of right.

Messrs. Muldoon & Pemberton and *Mr. David L. Pemberton*, for appellants.

Mr. William J. Brown, attorney general, *Mr. Keith F. Henley* and *Mr. Marvin I. Resnik*, for appellee Public Utilities Commission.

Messrs. Power, Jones & Schneider, Mr. John Robert Jones and *Mr. Andrew T. Jones*, for appellee General Telephone Company of Ohio.

Per Curiam. Where a public utility appeals a rate increase as being inadequate, and this court reverses the or-

der which granted the increase and remands the cause to the Public Utilities Commission, with instructions to set forth the reasons prompting its decision, are the increased rates to be charged until compliance by the commission upon remand or must the rates be lowered to what they were before the increase?

R. C. 4903.09 provides, in part, that "[i]n all contested cases heard by the Public Utilities Commission, a complete record of all proceedings shall be made, including * * * findings of fact and written opinions setting forth the reasons prompting the decisions arrived at * * *." In *General Telephone Co.* v. *Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, 285 N. E. 2d 34, this court agreed with General Telephone that the order in that case should be reversed because the commission had failed to sufficiently set forth the reasons prompting its decision, as mandated by R. C. 4903.09. The order was clearly unlawful. It follows, therefore, that General Telephone should not have continued to collect rates pursuant to an order which was unlawful and which had been reversed by this court.

Appellees contend, however, that even if the public utility could not continue to charge the increased rates established by the order, which was reversed in *General Telephone, supra*, it would be improper for the rates in effect prior to such order to be reinstated. Their assertion is based primarily upon the decision in *Cincinnati & Suburban Bell Telephone Co.* v. *Pub. Util. Comm.* (1923), 107 Ohio St. 370, 140 N. E. 86. In an effort to comprehend that case, however, attention must also be directed to *Cincinnati* v. *Pub. Util. Comm.* (1922), 105 Ohio St. 181, 137 N.E. 36. In viewing what transpired in those unusual cases, we do not consider them helpful in resolving the issue at hand. Furthermore, the reversal involved in those cases

was ordered without any reason being given therefor. In *General Telephone Co. Pub. Util. Comm., supra,* the court specifically withheld consideration of the reasonableness of the rate ordered, placing the reversal upon the sole ground of a failure by the commission to observe the requirements of R. C. 4903.09. Cf. *Cincinnati & Suburban Bell Telephone Co.* v. *Pub. Util. Comm., supra.*

It is our conclusion that when the order of August 17, 1971, was reversed by this court, the increased rates pursuant to such order could no longer be lawfully charged, and those rates in effect prior to the above order were reinstated by operation of law, and continued in effect until further order of the commission.

The order sustaining the motion to dismiss the complaint is unlawful and must be reversed.

Order reversed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN JJ., concur.

Motion of General Telephone Company of Ohio for Rehearing, Summary of Arguments, and Brief

IN THE SUPREME COURT OF OHIO
Case No. 74-414

GENE SLAGLE, INC., et al.,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.
GENERAL TELEPHONE COMPANY OF OHIO,
Intervening Appellee.

Appeal from the Public Utilities Commission of Ohio
Entry in Case No. 73-655-T

MOTION OF INTERVENING APPELLEE
FOR REHEARING

SUMMARY OF ARGUMENTS IN SUPPORT OF
MOTION FOR REHEARING

BRIEF IN SUPPORT OF MOTION
FOR REHEARING

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MOTION OF INTERVENING APPELLEE FOR REHEARING

Now comes General Telephone Company of Ohio, Intervening Appellee, and respectfully moves this Court for a rehearing of its decision of January 29, 1975, for the reasons that said decision provides for a confiscatory taking of property without due process of law, and in violation of equal protection of the laws, in that it establishes without any judicial review, rates found by the PUCO to be insufficient to provide General Telephone with a reasonable and adequate annual compensation and return, which finding was not challenged by any party or reviewed by this Court; and that said decision violates due process of law in that it chills and renders illusory a utility's constitutional rights of appeal. Intervening Appellee respectfully requests that this case be assigned for further oral argument before this Court, as was done in *City of Dayton* v. *PUCO*, 174 Ohio St. 604.

Respectfully submitted,

POWER, JONES & SCHNEIDER

/s/ JOHN ROBERT JONES
John Robert Jones

/s/ ANDREW T. JONES
Andrew T. Jones

Attorneys for Intervening Appellee, General Telephone Company of Ohio

SUMMARY OF ARGUMENTS IN SUPPORT OF MOTION FOR REHEARING

In its per curiam decision of January 29, 1975, the Court correctly stated the issue as follows:

> "Per Curiam. Where a public utility appeals a rate increase as being inadequate, and this court reverses the order which granted the increase and remands the cause to the Public Utilities Commission, with instructions to set forth the reasons prompting its decision, are the increased rates to be charged until compliance by the commission upon remand or must the rates be lowered to what they were before the increase?"

The Court resolved the foregoing issue by concluding:

> "It is our conclusion that when the order of August 17, 1971, was reversed by this court, the increased rates pursuant to such order could no longer be lawfully charged, and those rates in effect prior to the above order were reinstated by operation of law, and continued in effect until further order of the commission."

In its prior brief and argument to this Court, appellees relied principally on *Cincinnati & Suburban Bell Telephone Co.* v. *PUC*, 107 Ohio St. 370, and *Keco Industries* v. *PUCO*, 166 Ohio St. 254. The following arguments, and the authorities cited in the following brief were not presented to the Court and demonstrate that the decision of January 29, 1975, is in serious error.

Motion of General Telephone Company of Ohio, etc.

1. *The Decision Reinstates Confiscatory Rates Without Due Process Of Law And In Violation Of The Equal Protection Of The Law.*

The PUCO's August 17, 1971, order contained findings of fact and conclusions of law that the prior rates were insufficient and inadequate to yield a reasonable compensation and return. Such rates are unlawful and confiscatory under decisions of the United States Supreme Court.

The Commission's findings and conclusions that the prior rates were insufficient and inadequate were not challenged by any party. They were not in issue in any way before this Court when it decided *General Telephone Co.* v. *Pub. Util. Comm.*, 30 Ohio St. 271. To re-establish these rates constitutes confiscation of property without due process of law, and without affording equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States, and the Constitution of the State of Ohio.

According to the Court's per curiam opinion, these confiscatory rates were reinstated "by operation of law" upon the Court's reversal of the August 17, 1971, order. This statement, which is not accompanied by citation of authority, is contrary to the common law as enunciated by the Supreme Court of the United States and the highest courts of many states. In 73 *CJS*, Public Utilities §15, at page 1010, it is stated:

> "When rates established by the state or under its authority are set aside or otherwise become of no effect, a public utility has the right to establish its own rates, subject to the ordinary requirements of

reasonableness. A rate, so established by the utility is in force until it is modified or a different rate is fixed by proper authority."

The Court's decision further violates established legal principles of separation of powers between the legislature and the judiciary.

The consequences of the Court's ruling are to provide for confiscatory rates to be established for an indeterminate period, following a utility's successful appeal of a PUCO rate order, until action is taken by the PUCO, which experience shows can be an intolerable period.

2. *The Decision Violates Due Process of Law in That it Chills and Renders Illusory a Utility's Right of Appeal.*

The right of appeal to a court from an order of an administrative agency is mandated under the Fourteenth Amendment of the Constitution of the United States, and the Constitution of the State of Ohio, and decisions of the United States Supreme Court and of this Court.

The per curiam decision of this Court imposes the substantial risk of an enormous penalty to a utility considering an appeal of a PUCO order granting some, but not all, of the rate relief requested by it, because if the appeal is successful, and the Commission's Order is reversed, the utility loses the limited rate relief which was granted by the Commission for an indeterminate future period. The decision has the consequence of intimidating utility management from seeking an appeal by the utility from an order where legitimate grounds for appeal exist.

Motion of General Telephone Company of Ohio, etc.

This Court's grounding its decision in 30 Ohio St. 2d 271 upon Revised Code 4903.09, requiring the Commission to set forth reasons prompting its decision, does not limit the foregoing consequences of the Court's per curiam decision of January 29, 1975.

To penalize a utility if it wins an appeal of a PUCO rate order effectively takes away its right of appeal, in violation of constitutional guarantees of due process.

[Brief in support of motion for rehearing omitted]

Order of Ohio Supreme Court Denying Rehearing, April 17, 1975

THE SUPREME COURT OF THE STATE OF OHIO

1975 TERM

To wit: April 17, 1975

No. 74-414

REHEARING

THE STATE OF OHIO,

City of Columbus.

GENE SLAGLE, INC., et al.,

Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO et al.,

Appellees.

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 17th day of April, 1975.

THOMAS L. STARTZMAN

Clerk.

By

Deputy.

Entry of Public Utilities Commission of Ohio Pursuant to Mandate of the Supreme Court of Ohio, PUCO Case No. 73-655-T, June 10, 1975

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 73-655-T

In the Matter of the Complaint of GENE SLAGLE, INC., 463 East Center Street, Marion, Ohio, 43302, on his own behalf and on behalf of all subscribers of General Telephone Company of Ohio,

Complainants,

vs.

THE GENERAL TELEPHONE COMPANY OF OHIO, 100 Executive Dr., Marion, Ohio, 43302,

Respondent.

Relative to the Respondent allegedly charging and collecting rates for which no effective rates or schedules has been filed or maintained on or after June 21, 1972.

ENTRY

Pursuant to Mandate of the Supreme Court of Ohio

This matter came on to be considered by the Commission pursuant to the mandate of the Supreme Court of Ohio issued April 17, 1975 on reversal in *Gene Slagle Inc.* v. *Pub. Util. Comm.* (1975) 41 Ohio St. 2d 44 of the order of the Commission herein on January 10, 1974 dismissing the Complaint of *Gene Slagle* v. *The General Telephone Company of Ohio.*

Entry of Public Utilities Commission of Ohio, etc.

On April 21, 1975 Complainant herein filed its motion for an order executing judgment in conformity with the mandate of the Supreme Court of Ohio above referred to, and requesting the Commission to include in its order or entry at least the findings set forth in the Appendix attached thereto incorporated in the motion by reference. (See said Appendix to Motion for details)

On May 12, 1975, Respondent, The General Telephone Company of Ohio, filed its answer to the complaint setting forth thirteen defenses thereto, together with a memorandum in support. Respondent's theory, supporting the filing of its answer to the complaint, is that the Court having reversed the order of the Commission dismissing the complaint, it is now entitled as a matter of due process, to put the complaint to issue. Respondent urges that the Motion to Dismiss is tantamount to a demurrer under previous pleading rules and practices, wherein all allegations of operative facts are admitted to be true for the purpose only of testing the statement of a justiciable cause of action. (Now a complaint)

Respondent contends that under the decision of the Court, the complaint remains before the Commission and that the Commission should undertake to resolve the merits of its defenses through further proceedings.

The Complainant contends that further proceedings before this Commission are not contemplated let alone required by the opinion and mandate of the Court. Complainant asserts that the Motion to dismiss may not be construed in the manner urged by respondent since the that the Commission erred in the legal principles applicable facts are not in dispute and the Supreme Court has found to those facts.

If issues of fact remained to be established, undoubtedly the Supreme Court would have remanded the complaint to the Commission for further proceedings consistent with the Court's decision. This was not done which must be construed as decisive of all of the issues raised by Complainant in its Notice of Appeal. Thus the Commission is without jurisdiction to proceed further in this matter other than to carry out the Mandate of the Court.

On August 17, 1971, the Opinion and Order of the Commission was issued granting General's application for a rate increase in an amount less than sought by the Company. The rates pursuant to this Order of the Commission did not go into effect until November 16, 1971 because of restraints against price and wage increases by the Federal Government.

The Opinion and Order of the Commission was timely appealed to the Supreme Court and on June 21, 1972 the Court issued its decision reversing the Opinion and Order of the Commission on the ground that the Opinion and Order failed to recite sufficient facts to support the rate of return authorized and was not in conformity with the requirements of Section 4903.09 R.C. Because of that failure the Order of the Commission was set aside. *General Telephone Co.* v. *Pub. Util. Comm.* 30 Ohio St. 2d 271 at page 277.

The Mandate for compliance with this decision was received by the Commission on July 10, 1972. On September 29, 1972 the Commission in compliance with the Mandate issued its Opinion and Order confined to a detailed description supporting the rate of return allowed in the August 17, 1971 Opinion and Order. In all other aspects, the August 17, 1971 Opinion and Order was reaffirmed.

Entry of Public Utilities Commission of Ohio, etc.

The Complaint herein was filed September 5, 1973. General filed its Motion to dismiss on November 7, 1973 and on January 10, 1974 General's Motion to dismiss the Complaint was sustained and the Complaint was dismissed. Motion for rehearing having been denied on March 7, 1974, Complainant filed its appeal to the Supreme Court on May 6, 1974, and on January 29, 1975 the Court issued its decision reversing the dismissal of the Complaint. The Mandate pursuant thereto was issued by the Court on April 17, 1975.

WHEREFORE, and in compliance with the Mandate of the Court, the Commission now makes the following findings of law, to wit:

1. That when the Order of August 17, 1971 was reversed by the Supreme Court, the increased rates pursuant to such Order could no longer be lawfully charged, and

2. That the rates in effect prior to the August 17, 1971 Order were reinstated by operation of law, and

3. That pursuant to the decision of the Supreme Court issued June 21, 1972 said increased rates could no longer be lawfully charged and collected thereafter until further order of the Commission; and

4. That the Opinion and Order of the Commission issued September 29, 1972 pursuant to the Mandate of the Supreme Court in the General rate case, supra, authorized the same rates which it had previously granted; and

5. That inclusion of the specific "findings" requested by Complainant are not in conformity with the mandate herein.

WHEREFORE, it is ordered

1. That copies of this Entry be served upon all parties hereto.

THE PUBLIC UTILITIES COMMISSION OF OHIO
C. LUTHER HECKMAN, *Chairman*
SALLY W. BLOOMFIELD
DAVID SWEET, *Commissioners*

Entered in the Journal
June 10, 1975.

A True Copy
/s/ RANDALL G. APPLEGATE,
Randall G. Applegate,
Acting Secretary.

AUG 15 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

vs.

GENE SLAGLE, INC., ET AL.
and
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

vs.

GENE SLAGLE, INC., ET AL.
and
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE[1]

The Ohio statutes require a public utility such as petitioner to obtain an order of the Public Utilities Commission of Ohio (PUCO) before charging and collecting increased rates. Ohio Revised Code Sections 4905.22 and 4909.17, among others. The Ohio statutes also require that such an order be issued in accordance with specific and mandatory guidelines, including the requirement that the PUCO set forth the reasons prompting its decision. Ohio Revised Code Section 4903.09.

On August 17, 1971, petitioner obtained a PUCO order authorizing petitioner to increase its rates. However, petitioner was not satisfied with the amount of the rate increase and, on November 10, 1971, appealed to

[1] Since respondents are dissatisfied with petitioner's statement of the case and with petitioner's statement of the question presented for review, respondents will restate these specifications of Rule 40 in their brief.

the Ohio Supreme Court alleging that the rate of return afforded by the PUCO in its August 17, 1971 order was inadequate.

On June 21, 1972, in attempting to review petitioner's allegations of error, the Ohio Supreme Court found that the PUCO's August 17, 1971 order was itself unlawful in that it failed to comply with the mandatory provisions of Section 4903.09. The Court, therefore, reversed and set aside said order and remanded the cause to the PUCO with instructions to comply with that statute. In so doing, the Court said, "The record being incomplete, no decision as to the reasonableness of the determined rate of return can be made." *General Telephone Co. v. Pub. Util. Comm.*, 30 Ohio St. 2d 271, 285 N.E. 2d 34 (1972); Pages 1a to 9a of petitioner's Appendix.

On September 5, 1973, respondents filed a complaint against petitioner alleging that petitioner had violated the express provisions of the Ohio statute by continuing to charge and collect rates established by petitioner pursuant to the PUCO's August 17, 1971 order subsequent to the Ohio Supreme Court's reversal of said order in *General Telephone Co. v. Pub. Util. Comm., supra.* Respondents' complaint was dismissed by the PUCO on January 10, 1974, whereupon respondents appealed to the Ohio Supreme Court.

On January 29, 1975, the Ohio Supreme Court held, in a *per curiam* decision, that since the August 17, 1971 rate order was "clearly unlawful," petitioner should not have continued to collect the rates established thereunder but should have reverted to its prior rates until further order of the PUCO. In its January 29, 1975 decision, the Court emphasized that in *General Telephone Co. v. Pub. Util. Comm., supra,* the Court had "specifically withheld consideration of the reasonableness of the

rate ordered, placing the reversal upon the sole ground of a failure by the commission to observe the requirements of R.C. 4903.09." *Gene Slagle, Inc. v. Pub. Util. Comm.*, 41 Ohio St. 2d 44, 322 N.E. 2d 640 (1975); Pages 38a to 42a of petitioner's Appendix.

On April 17, 1975, petitioner's motion for rehearing was denied by the Ohio Supreme Court; and on July 15, 1975, petitioner filed the subject petition claiming jurisdiction under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

As viewed by petitioner, the question presented is whether petitioner has been deprived of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution as a result of the Ohio Supreme Court's decision. However, in order to reach the question posed by petitioner, this Court must assume facts which simply do not exist in the instant case; and this Court must also ignore the fact that, even assuming *arguendo* petitioner's facts, petitioner's constitutional objections were not timely raised.

Respondents submit that, contrary to petitioner's assertions, the question presented to this Court for review is a state, not a federal, question and that the question presented is simply whether, under the Ohio law, a public utility may continue to charge and collect rates established pursuant to an order of a state public utilities commission where the order has been reversed and set aside as unlawful by a competent court and where the order is required by state statute as a condition to charging the rates.

ARGUMENT

I.

Petitioner Has Not Been Deprived Of Any Right, Privilege, Or Immunity Guaranteed By The Constitution Of The United States

In order to invoke the jurisdiction of this Court under the circumstances herein presented, petitioner must establish that the Ohio court has decided a federal question not heretofore determined by this Court or has decided such a question in a way not in accord with applicable decisions of this Court. Moreover, it is fundamental that the alledged federal question must arise from the facts which are actually operative and established in the cause and not from the whim, imagination, or fancy of the petitioner.

In the instant case, petitioner's alleged federal question includes three premises which are not supported by the facts herein. First, petitioner asserts that in *General Telephone Co. v. Pub. Util. Comm., supra,* in which the Ohio Supreme Court reversed and set aside the PUCO's August 17, 1971 rate order, petitioner was "successful" on appeal. Second, petitioner asserts that since petitioner was "successful" on appeal, the Ohio Supreme Court's subsequent decision that petitioner should not have collected the rate increase until a further PUCO order issued constitutes a penalty which deprives petitioner and other Ohio utilities of their constitutional right of appeal. Third, petitioner asserts that the Ohio Supreme Court's decision requires it to revert to constitutionally confiscatory rates. None of these assertions are correct.

First, in prosecuting its appeal in *General Telephone Co. v. Pub. Util. Comm., supra,* petitioner alleged and argued that the rate of return afforded by the PUCO's August 17, 1971 order was inadequate. The Ohio Supreme Court, however, did not, in fact, could not, reach

this issue and reversed on other grounds. The Ohio Supreme Court did not concur with petitioner, therefore, that the rate of return was inadequate. Instead, the Ohio court found the entire rate order invalid under the Ohio statute and set the entire order aside, including those portions granting petitioner any increase in rates. In so doing, the Ohio court "specifically withheld consideration of the reasonableness of the rate ordered," as it was required to do under the Ohio law, and specifically refrained, therefore, from concurring with any of the petitioner's representations concerning the inadequacy of the rate of return found by the PUCO. *Gene Slagle, Inc. v. Pub. Util. Comm., supra.*

Second, the Ohio Supreme Court's decision that petitioner should not have collected the rate increase afforded by the August 17, 1971 order until further order of the PUCO does not constitute a penalty to petitioner or a deterrent to other Ohio utilities to appeal. Ohio Revised Code Section 4903.13 vests jurisdiction in the Ohio Supreme Court to review PUCO rate orders. That section, a copy of which is included in respondents' appendix, gives the Ohio court broad discretion to affirm, reverse, vacate, *or modify* such orders. In an appropriate case, therefore, i.e., where the order itself meets the minimum requirements for judicial review, a truly successful utility-appellant need have no fear concerning the loss of a lawfully established rate increase.[2] Neither

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[2] In this regard, this Court's attention is called to the fact that on June 11, 1975, more than a month prior to the filing of the petition herein, the Ohio Supreme Court issued a decision affirming in part and reversing in part a PUCO rate order at the behest of an Ohio utility and subsequently enjoined the PUCO from prohibiting the utility from filing interim rate schedules to preserve the increase afforded by said order on the strength of the Court's holding in this case. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403 (1975). In so doing, respondents submit, the Ohio Supreme Court acted consistently with its decision in this case wherein, in distinguishing other cases from its decision in *General Telephone Co. v. Pub. Util. Comm., supra*, the Court emphasized that consideration of the reasonableness of the rate had been specifically withheld.

does that section or any other provision of the Ohio law attach any condition or penalty to a utility's exercise of its right to judicial review.

As to the effect on petitioner of the Ohio court's exercise of its statutory review powers in the instant case, it is sufficient to note that since the Ohio court initially found the PUCO's rate order statutorily deficient and, therefore, invalid, its subsequent finding that petitioner was not entitled to collect the increase afforded thereby deprived petitioner of nothing to which it was entitled under the Ohio law.

Third, there is absolutely no evidence in the instant case to support petitioner's repeated assertions that its prior rates were or are confiscatory; and respondents strongly object to petitioner's repeated representations to the effect that the confiscatory character of such rates is "undisputed."

Petitioner's entire basis for asserting that its prior rates were confiscatory is the PUCO's August 17, 1971 finding that said rates were "insufficient" to yield "adequate" compensation. This finding, it must be noted, was contained in the very same rate order which the Ohio court set aside as unlawful. It should also be noted that this finding is a condition precedent under the Ohio statute to the PUCO's awarding any public utility a rate increase. Ohio Revised Code Section 4909.15. The finding itself, therefore, is entitled to little, if any, consideration. Morever, it has long been recognized, under both Ohio and federal law, that a rate which is insufficient or even unreasonable is not necessarily confiscatory in a constitutional sense. Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L. Ed. 333 (1944), and *Portsmouth v. Pub. Util. Comm.*, 108 Ohio St. 272 (1923).

When careful consideration is given to the assumptions contained in petitioner's statement of the question presented to this Court for review, it is apparent that petitioner has seriously taxed its credibility to avoid the obvious conclusion that the Ohio Supreme Court's decision raises neither of the constitutional issues presented by the petition but is premised entirely upon state law. Consequently, respondents will not burden this Court by individually distinguishing the ases cited in support of the petition except to note that those cases presented far different facts and circumstances than does the instant case.

II.

The Alleged Federal Question Was Not Timely Raised

At Page 4 of the petition, petitioner states: "Since this decision represented a new and unanticipated construction of state law *conflicting with previous decisions* of the Court below, petitioner filed a motion for rehearing on the grounds that its decision reinstated confiscatory rates in violation of the Fifth and Fourteenth Amendments of the United States Constitution (App. 49a) and deprived petitioner of procedural due process in that it rendered illusory a utility's right of appeal. (App. 50a) The federal constitutional issue was thus timely raised. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930)." (Emphasis added)

Apparently in recognition that in the *Brinkerhoff-Faris Trust* case, *supra,* this Court relied heavily upon the state court's change in its prior construction of state law in finding that the alleged federal question had been

timely raised, even though not raised until subsequent to the state court's decision, petitioner alleges that the Ohio court's decision herein represents a conflict with its previous decisions. This is simply not so, however; and it is noteworthy that the petition contains not a single citation to a single decision of the Ohio Supreme Court or of any other Ohio court which conflicts with the interpretation of Ohio law set forth in the decision herein.

The Ohio Supreme Court's *per curiam* holding in the instant case recites almost verbatim the proposition of law urged in the respondents' notice of appeal to the Ohio court and which was extensively briefed and argued by all parties long before the Court's January 29, 1975 decision. Yet, neither of the alleged constitutional issues now attempted to be raised by petitioner was ever presented to the Ohio court prior to the issuance of the Ohio court's decision. Under such circumstances, respondents submit, the situation presented in *Ellis v. Dixon*, 349 U.S. 458, 99 L. Ed. 1231, rehearing denied 350 U.S. 855, 100 L. Ed. 759 (1955), among others, is more characteristic of petitioner's posture before this Court in this case.

CONCLUSION

An examination of the facts presented to this Court in the instant case as opposed to the petitioner's unsupported assumptions clearly supports the conclusion that the petitioner has not been deprived of any right, privilege, or immunity guaranteed by the United States Constitution and, in particular, by the due process clause of the Fourteenth Amendment thereto and that, conse-

quently, the petition should be denied. The petition should also be denied, respondents submit, since the alleged federal question was not timely raised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief In Opposition To Petition For Writ of Certiorari were sent by United States first class mail, postage prepaid, to counsel representing the parties to this proceeding this 14th day of August, 1975.

DAVID L. PEMBERTON

APPENDIX

Ohio Revised Code Sections Cited

§ 4905.22 Service and facilities required; unreasonable charge prohibited. (GC §§ 614-12, 614-13)

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service or in excess of that allowed by law or by order of the commission.

§ 4909.17 Application for change in rate; approval. (GC § 614-20)

No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18 and 4909.19 of the Revised Code. Such sections do not apply to any rate, joint rate, toll classification, charge, or rental, or any regulation or practice affecting the same, or railroads, street and electric railways, motor transportation companies, telegraph companies, and pipe line companies. Any change of any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of telegraph

companies, may be made in the same manner as such changes may be made by railroad companies. All laws respecting such changes by railroad companies apply to such changes by telegraph companies.

§ 4903.09 Written opinions filed by commission in all contested cases. (GC § 614-46a)

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

§ 4903.13 Reversal of final order; notice of appeal. (GC §§ 544, 545)

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4909.15 Fixation of reasonable rate. (GC § 614-23)

When the public utilities commission is of the opinion, after hearing, that any rate, fare, charge, toll, rental,

schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall, with due regard among other things, to the value of all property of the public utility actually used and useful for the convenience of the public, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and with due regard to all such other matters as are proper, according to the facts in each case, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service, shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any

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other, rate, fare, toll, charge, rental, classification, or service is prohibited.

Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

v.

GENE SLAGLE, INC.,
and
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Now comes the Public Utilities Commission of Ohio (Respondent Commission) by its Counsel William J. Brown, Attorney General of Ohio, and supports the Petition of the General Telephone Company of Ohio (Petitioner) for a writ of certiorari to review the judgment of the Supreme Court of the State of Ohio in the case of *Gene Slagle, Inc. v. Pub. Util. Comm.* (1975) 41 Ohio St. 2d 44. Since Respondent Commission supports the petition it is filing this Brief pursuant to U.S. Sup. Ct. Rule 21 (4), 28 U.S.C. This filing has been made as promptly as possible as required by said rule. The Statement of the Case outlining the procedural history of this matter as presented by Petitioner is acceptable to Respondent Commission.

REASONS FOR GRANTING THE WRIT

Respondent Commission believes that the Opinion of the Supreme Court of Ohio in *Gene Slagle, Inc., supra,* has such a significant impact on utility regulation, that it would certainly be appropriate for this Court to review that Opinion.

The present state of law in Ohio, since the Ohio Supreme Court's decision in *Gene Slagle, Inc., supra,* is such that Ohio's public utilities may well be faced with a serious dilemma when deciding whether to appeal a rate order of the Respondent Commission, which order granted only a portion of the rate relief sought by the public utility. If the appeal is taken and the public utility is successful on appeal, under *Gene Slagle, Inc., supra,* "those rates in effect prior to the (appealed) order (are) reinstated by operation of law, and (continue) in effect until further order of the (Respondent Commission)". If the appeal is not taken, the public utility is constrained to accept a rate increase which it may believe to be insufficient and which the Supreme Court of Ohio might find to be unlawful.

The issues raised by the Petition do seem to be of a substantial Federal nature. The Supreme Court of the State of Ohio's decision in *Gene Slagle, Inc., supra,* draws into question an Ohio public utility's right to due process under the Fourteenth Amendment of the United States Constitution. Whether that decision would be applicable in jurisdictions other than Ohio, Respondent Commission cannot say. However, future decisions of the Supreme Court of the State of Ohio on appeals from rate orders of Respondent Commission will be subject to the effect of the decision in *Gene Slagle, Inc., supra.* Because this decision will have continuing effect at least within Ohio and because the effect could be con-

stitutionally infirm Respondent Commission believes that the Petition should be granted.

Although Respondent Commission would normally welcome a ruling of the Supreme Court of Ohio which might have the effect of finalizing rate orders of Respondent Commission by making appeals by the public utility involved less likely, it does not believe that such finalizing should come at the expense of even potential infringement of constitutionally protected rights. It is for this reason that Respondent Commission fully supports Petitioner's efforts to obtain review of the decision of the Supreme Court of Ohio to determine whether that decision is constitutionally infirm.

Respondent Commission has not, in this Brief, addressed the merits of issues raised by Petitioner. Rather, this Brief is limited to reasons why Respondent Commission believes this Court should grant the Petition before it. Should this Court grant the Petition and review the decision of the Supreme Court of the State of Ohio, Respondent Commission will fully participate and will at that time address itself to the merits of the case.

CONCLUSION

Respondent Commission supports the Petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Ohio in the case of *Gene Slagle, Inc. v. Pub. Util. Comm.* (1975) 41 Ohio St. 2d 44 and respectfully urges this Court to grant such Petition.

Respectfully submited,

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In the

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October Term, 1975

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and

The Public Utilities Commission of Ohio,

Respondents.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT GENE SLAGLE'S BRIEF IN OPPOSITION TO CERTIORARI

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In the

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Respondent Slagle's argument that the federal question presented was not timely raised in the Court below is without merit. As we have pointed out in our petition, the decision of the Court below is unique and flies in the face of long-established law and precedent. It is also in conflict with previous decisions of the Court below specifically dealing with the effect of a reversal of a PUC rate order and thus considered controlling by the petitioner and the PUC. (App. 32a). In *Cincinnati & Suburban Bell Telephone Co.* v. *Public Utilities Comm'n*, 107 Ohio St. 370,

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140 N.E. 86 (1923), the Court below said (App. 35a) that after reversal and remand to the PUC,

> "Such just and reasonable rate might or might not have been the rate theretofore in force, but the latter would not become the rate automatically. Both the utility and its patrons would have been entitled to have the judgment of the Public Utilities Commission upon that subject. . . ."

In *Keco Industries* v. *Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), the Court below held that where a rate increase order is found unreasonable on appeal, a subscriber is not entitled to a refund of such increased charges collected prior to the entry of a rate reduction order by the Commission on remand.

See also *City of Columbus* v. *Public Utilities Comm'n*, 170 Ohio St. 105, 163 N.E.2d 167 (1959), Syllabus by the Court, par. 4.

The federal constitutional issue did not arise until the Ohio Court's unanticipated refusal to follow generally accepted and long-established principles of public utility law and its own precedents and was raised by the petitioner at the first opportunity.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, a Writ of Certiorari should issue.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION FOR LEAVE TO FILE JOINT BRIEF AMICI CURIAE AND JOINT BRIEF AMICI CURIAE IN SUPPORT OF PETITION

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Ohio Bell Telephone Company, The Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, Columbus and Southern Ohio Electric Company, The Dayton Power and Light Company, Ohio Edison Company, Ohio Power Company, The Toledo Edison Company, and Columbia Gas of Ohio, Inc., respectfully move this Honorable Court, pursuant to Rule 42 of the Rules of Court, for leave to file the attached joint brief *amici curiae* in support of the petitioner, General Telephone Company of Ohio, in this case. The consent of counsel for the petitioner and respondent The Public Utilities Commission of

Ohio has been requested and obtained. The consent of counsel for respondent Gene Slagle, Inc. has been requested, but refused.

The interests of each of the applicants individually and collectively and grounds in support of this motion are set forth as follows:

1. Each of applicants The Cincinnati Gas & Electric Company, The Cleveland Electric Illuminating Company, Columbus and Southern Electric Company, The Dayton Power and Light Company, Ohio Edison Company, Ohio Power Company and The Toledo Edison Company is an electric light company as defined in Ohio Revised Code Section 4905.03(A) (4) and hence a public utility as defined in Ohio Revised Code Section 4905.02, rendering electric service for light, heat and power purposes to consumers in the State of Ohio and subject to regulation, *inter alia*, with respect to rates and charges for such service by The Public Utilities Commission of Ohio. Collectively said applicants render substantially all of such electric service in Ohio subject to the jurisdiction of the Commission.

2. The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and The Toledo Edison Company are also natural gas companies as defined in Ohio Revised Code Section 4905.03(A)(6), as is Columbia Gas of Ohio, Inc., rendering gas service to consumers in various parts of Ohio. The Cleveland Electric Illuminating Company, The Dayton Power and Light Company, Ohio Edison Company and The Toledo Edison Company are also heating companies as defined in Ohio Revised Code Section 4905.03 (A) (9), rendering steam heating service to consumers in various locations in Ohio. With respect to such natural gas and steam service, your applicants are similarly subject to the jurisdiction of The Public Utilities Commission of Ohio with respect to the rates and charges made for such service.

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3. Ohio Bell Telephone Company is a telephone company as defined in Ohio Revised Code Section 4905.03(A)(2), rendering telephone service to subscribers in a substantial part of the State of Ohio and is, in respect of such service, similarly subject to the jurisdiction of The Public Utilities Commission of Ohio.

4. Each of your applicants presently has, or recently has had, pending before The Public Utilities Commission of Ohio one or more applications for rate relief pursuant to Ohio Revised Code Section 4909.18, the same statute pursuant to which petitioner, General Telephone Company of Ohio (hereinafter sometimes referred to as General Telephone), initiated the proceeding for rate relief out of which arose the within Petition for Certiorari. Certain of your applicants have in the past been, and each of your applicants may in the future be, entitled to appeal to the Ohio Supreme Court from decisions of the Commission pursuant to Ohio Revised Code Section 4903.13 as was General Telephone Company in *General Telephone Co. v. Public Utilities Commission*, reported at 30 Ohio St. 2d 271, 285 N.E.2d 34 (1972). For example, The Cleveland Electric Illuminating Company was recently a party to an appeal before the Ohio Supreme Court, in which it was the appellant urging that an order of The Public Utilities Commission granting to it an increase in rates was insufficient in amount, precisely parallel to the appeal made by General Telephone Company in the proceeding reported as *General Telephone Co. v. Public Utilities Commission of Ohio, supra*. In that appeal the Ohio Supreme Court reversed in part and affirmed in part the decision of The Public Utilities Commission. Upon remand, the Commission issued an order purporting to apply the decision of the Ohio Supreme Court, dated January 29, 1975, and reported as *Gene Slagle, Inc. v. Public Utilities Commis-*

sion of Ohio, 41 Ohio St. 2d 44, 322 N.E. 2d 640 (1975), finding that the significantly lower rates in effect prior to the order appealed from were reinstated despite the fact that, as the Commission subsequently held by order dated July 3, 1975, the effect of the Ohio Supreme Court's decision was obviously to *increase* the rates of said utility.

5. The *Slagle* decision, *supra,* and the construction of the applicable Ohio statutes explicitly and implicitly there established, substantially and adversely affect the right of your applicants, and of all other public utilities subject to the jurisdiction of The Public Utilities Commission of Ohio, to exercise their constitutional right to an independent judicial review of orders of the Commission affecting rates and charges for utility services and, by imposing a substantial and, we believe, unconstitutional risk upon any utility which seeks review by the Ohio Supreme Court of such orders, deprives your applicants and any other such utilities of their property without due process of law, as set forth in detail in the brief appended hereto.

6. Your applicants are cognizant of the fact that the within Petition for Certiorari has already been briefed. The questions implicit in ths case, however, are of such crucial significance to the enterprises subject to the jurisdiction of The Public Utilities Commission of Ohio and are so capable of confusion in, if not invalidation of, the regulatory process in Ohio, results which it seems likely will neither be fully appreciated nor brought to the attention of the Court, that full consideration thereof is appropriate and participation herein by these applicants as *amici curiae* should be allowed.

Applicants will necessarily concentrate on the particular effect that the *Slagle* decision will have on their collective interests as utility companies. In the brief tendered with this motion, applicants treat the question of the con-

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stitutionality of the *Slagle* decision in the Ohio Supreme Court below more narrowly than does the brief submitted by the petitioner, General Telephone Co. Specifically, applicants emphasize that, in the area of public utility regulation, special judicial scrutiny must be applied to the regulating authority in order to protect the utilities from a confiscatory taking of their property. This judicial protection has taken the form of a constitutionally guaranteed right of appeal from the determinations of the regulatory authority. It is submitted that the *Slagle* decision below effectively renders that constitutionally protected right "nominal and illusory."

Hence, applicants submit that their interests as enumerated in the above recited relevant facts and points have not been, and will not be, adequately or fully presented by the parties presently before this Court.

For the foregoing facts and reasons, it is respectfully requested that this motion be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

v.

GENE SLAGLE, INC.,

and

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

JOINT BRIEF OF AMICI CURIAE
In Support of Petition for a Writ of Certiorari

INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of virtually all of the electric utilities in the State of Ohio, the State's largest telephone company, and a major natural gas company. All are seriously concerned with, and adversely affected by, the application of the Ohio Supreme Court's decision below reported as *Gene Slagle, Inc. v. Pub. Util. Comm'n*, 41 Ohio St. 2d 44, 322 N.E.2d 640 (1975) (hereinafter *Slagle*). The actual import of that case, simply stated, is that a utility seeking relief from The Public Utilities Commission of

Ohio must not only wait years in order to obtain such relief but, if it obtains only partial relief, must forego invoking judicial protection by way of appeal to the Ohio Supreme Court. For if it appeals and is successful, it must give up the benefit of the partial increase while it waits, perhaps for even more years, for the Commission to get around to its case again.

This is a completely new departure in the law of Ohio, appearing for the first time after some six decades of regulation. It is not only in conflict with consistent Ohio regulatory practice, but with the law of Ohio as previously laid down by the Ohio Supreme Court in *Cincinnati & Suburban Bell Telephone Co., v. Pub. Util. Comm'n*, 107 Ohio St. 370, 140 N.E. 86 (1923).

That this is no abstract question is forcefully demonstrated by a recent order of The Public Utilities Commission of Ohio affecting The Cleveland Electric Illuminating Company, one of the applicants herein. In an electric rate increase proceeding before the Commission this company was granted a partial rate increase, from which it took an appeal to the Ohio Supreme Court, a situation precisely parallel to that of petitioner, General Telephone Company of Ohio. In a decision reported as *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, ___N.E.2d___ (1975), the Supreme Court of Ohio affirmed in part and reversed in part the decision of The Public Utilities Commission.

Thereafter, on June 16, 1975, The Public Utilities Commission of Ohio entered an order, a copy of which appears in the Appendix to this brief, finding that, under the doctrine of the *Slagle* case, the Company's rates had reverted to the significantly lower rate levels prevailing prior to its initial grant of an increase. It did this although, as it shortly thereafter recognized by its order dated July 3, 1975, a copy of which appears in the Appendix of this brief,

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the obvious effect of the decision of the Ohio Supreme Court was to give to this particular utility a *higher* increase in rates than that previously granted.

ARGUMENT

I. PUBLIC UTILITIES HAVE A CONSTITUTIONALLY GUARANTEED RIGHT TO JUDICIAL REVIEW OF CONFISCATORY ORDERS ISSUED BY A STATE REGULATORY AGENCY.

Although the businesses conducted by persons such as your applicants are so affected with the public interest that they may lawfully be subject to regulation, including regulation as to rates, the imposition of such regulation conversely gives rise to a constitutional protection against the confiscation of their property. *Bluefield Water Works v. Pub. Service Comm'n,* 262 U.S. 679, 690 (1923). That is, while the legislature may fix rates either directly or through delegation to a regulatory agency such as The Public Utilities Commission of Ohio, a utility is entitled to *judicial protection* against the arbitrary exercise of that authority.

This principle has been accepted since the very beginning of modern public utility regulation. For example, in *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota,* 134 U.S. 418 (1890), this Court held that a Minnesota statute which made the rate findings of a regulatory commission conclusive and which denied judicial review, was unconstitutional.

> "This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and

with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." 134 U.S. at 418.

Thus, a regulated utility is entitled, *as a constitutional matter,* to the independent judgment of a court in matters of this kind. As this Court said in *Ohio Valley Co. v. Ben Avon Borough,* 253 U.S. 287 (1920):

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. * * * In all such cases, if the owner claims confiscation of his property will result, *the State must provide a fair opportunity for submitting that issue to a judicial tribunal* for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 253 U.S. at 289 (citations omitted; emphasis supplied).

The Ohio Supreme Court has hitherto consistently recognized this principle. In *Hocking Valley Ry. Co. v. Pub. Util. Comm'n,* 100 Ohio St. 321, 126 N.E. 397 (1919), that court said:

> "It will be observed that both before and since the constitutional amendment the legislature realized that in order to give validity to the proceedings and orders of the commission *it was necessary that some adequate provision for their judicial review should be made,* because if by legislative act or administrative order property or rights are taken or affected parties must be given full opportunity to show by judicial review that the taking or interference with rights or property was so arbitrary, unjust or unreasonable as to amount to a deprivation in violation

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of the constitution. This principle is nowhere denied. It is invoked and declared in *C., M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418, and *Hocking Valley Ry. Co. v. The Public Utilities Commission et al.*, 92 Ohio St., 9, 14." 100 Ohio St. at 323.

And it is quite plain that not only must there be *some* provision for judicial review, but that provision must be a real, substantial one, whether we call it a "fair opportunity" as did this Court in the *Ohio Valley* case, *supra*, or an "adequate provision," as the Ohio Supreme Court did in *Hocking Valley Ry. v. Pub. Util. Comm'n, supra*. As this Court said in *Wadley Southern Ry. v. Georgia*, 235 U.S. 651 (1915), a decision quoted with approval by the Ohio Supreme Court in *Hocking Valley Ry. Co. v. Pub. Util. Comm'n, supra*:

> "The methods by which this right to a judicial review are secured vary in different jurisdictions. In some States there is a provision that within a designated time the order may be reviewed by the courts on the evidence submitted to the Commission. *Oregon R.R. & Nav. Co. v. Fairchild*, 224 U.S. 510; *State ex rel. Railroad Commission v. Oregon R.R. & Nav. Co.*, 68 Washington, 160, 167; *Seward v. Denver & R.G. R.R.*, 17 New Mex. 557; 131 Pac. Rep. 980. *Cf. Oregon R.R. & Nav. Co. v. Campbell*, 173 Fed. Rep. 957, 989. In others by proceedings in equity. In the Federal courts the method of procedure, when administrative orders are attacked as unconstitutional, is now regulated by § 266 of the Judicial Code as amended (March 4, 1913, c.160, 37 Stat. 1013, 1014). But in *whatever method enforced, the right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield* to orders of uncertain legality rather than to ask for the protection of the law." 235 U.S. at 66 (emphasis supplied).

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II. THE SLAGLE DECISION IN THE OHIO SUPREME COURT BELOW EFFECTIVELY RENDERS THE RIGHT OF A UTILITY TO APPEAL THE DECISION OF THE REGULATORY AGENCY "NOMINAL AND ILLUSORY."

The Ohio Supreme Court's decision below in *Slagle, supra,* effectively renders "nominal and illusory" the procedures for review of orders of the Public Utilities Commission in rate cases, procedures which heretofore the Ohio Supreme Court has held constitutional precisely because they provided for the Ohio Supreme Court's independent and neutral judicial judgment. *Hocking Valley Ry. Co. v. Pub. Util. Comm'n, supra.* As a practical matter, it will be a highly courageous, if not foolhardy, utility which, having received *part* of requested rate relief from the Commission, will venture to seek further relief from the Ohio Supreme Court.

Many of your applicants have, or have had, applications pending before the Ohio Commission for extraordinary rate relief and several have received such relief on express findings by the Commission of the existence of financial emergencies. To suggest that utilities in such straits will, upon receiving *some* rate relief after years of waiting, put it in jeopardy in order to seek their full constitutional entitlement is absurd. And this is true, despite the fact that *they are constitutionally entitled to do just that.* We submit that a construction of the Ohio statutes which produces this result is unconstitutional.

It is plain that a *practical* withdrawal of the right of appeal is just as unconstitutional as an express one. The situation is analogous to that presented to this Court in *Green v. United States,* 355 U.S. 184 (1957). There the Court held that where a defendant was indicted and tried for first degree murder but found guilty of second degree murder only and then was successful, on appeal, in reversing that conviction, he could not be tried a second time for first degree murder. This Court said:

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> "|T|he Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. *Johnson v. Zerbst*, 304 U.S. 458. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." 355 U.S. at 191 (emphasis by the Court).

We submit that the Ohio Supreme Court's decision in *Slagle, supra,* means precisely the same thing, that a utility seeking rate relief and having obtained some, but less than that to which it believes itself entitled, "has no meaningful choice." As this Court said in *Green, supra*:

> "Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, *a defendant faced with such a 'choice' takes a 'desperate chance' in securing*

the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U.S. at 193 (emphasis supplied).

In short, where a constitutional right is involved, as one is here, the State simply cannot put a price on the right of appeal. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969). That, however, is precisely what the Ohio Supreme Court did in *Slagle, supra*.

CONCLUSION

The decision by the Ohio Supreme Court in *Slagle* has in fact had the effect of imposing a penalty upon all Ohio public utilities for exercising a constitutionally guaranteed right of appeal from decisions of the state regulatory agency. This result effectively nullifies that right of appeal, a result contrary to both the statutes of Ohio as well as to the due process clause of the Fourteenth Amendment to the United States Constitution. For the foregoing facts and reasons, it is respectfully requested that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No. 71-634-Y

In the Matter of the Application of The Cleveland Electric Illuminating Company for authority to amend and increase its filed schedules fixing rates and charges for electric service.

Case No. 75-437-EL-ATA

In the Matter of the Application of The Cleveland Electric Illuminating Company to refile its rates.

ENTRY

(Entered June 16, 1975)

The Commission, coming now to consider the above-entitled matters and being fully advised in the premises, finds:

(1) By its opinion of June 11, 1975, in its Case No. 74-276, the Supreme Court of Ohio reversed in part and affirmed in part the order of this Commission in its Case No. 71-634-Y, wherein the Commission granted a general rate increase to the Cleveland Electric Illuminating Company.

(2) The Cleveland Electric Illuminating Company thereafter filed an application with the Commission requesting authority to refile the rates presently in effect pursuant to Commission order in Case No. 71-634-Y, which the Commission granted by its entry of June 13, 1975 (Case No. 75-437-EL-ATA).

(3) Upon advise of counsel and upon consideration of the Supreme Court's decision in *Slagle v. Public Utilities Commission*, 41 Ohio St. 2d 44 (1975), the Commission finds that its approval of the application in Case No. 75-437-EL-ATA was improper and that the entry approving the refiling of these schedules should be stricken from its Journal and held to be of no effect.

(4) Under *Slagle*, *supra*, the increased rates which have been charged and collected pursuant to the order appealed from may no longer be lawfully charged after the reversal by the Supreme Court and those rates in effect prior to the Commission's order in Case No. 71-634-Y are reinstated by operation of law.

It is, therefore,

ORDERED, That the above findings be observed. It is, further,

ORDERED, That copies of this entry be served upon all parties of record in the above-captioned cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

C. LUTHER HECKMAN, *Chairman*
SALLY W. BLOOMFIELD
DAVID SWEET, *Commissioners*

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

Case No. 71-634-Y

In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to amend and to increase its filed schedules for fixing rates and charges for electric service.

OPINION AND ORDER
(Entered July 3, 1975)

The Commission, coming now to consider the above-entitled matter, its Opinion and Order herein of November 28, 1973, the decision of the Supreme Court of Ohio in *Cleveland Electric Illuminating Company v. Public Utilities Commission,* 42 Ohio St. 2d 403 (1975) which affirmed in part and reversed in part that order, and being otherwise fully advised in the premises and in compliance with Section 4903.09 Revised Code, hereby renders its Opinion and Order on remand.

HISTORY OF THE PROCEEDINGS:

This case originally came before the Commission upon the application of The Cleveland Electric Illuminating Company for authority to increase its rates and charges for electric service. On November 28, 1973, this Commission issued its Opinion and Order granting, in part, the prayer of the application and authorizing applicant to increase said rates and charges, but not to the full extent requested by applicant. By Order dated January 22, 1974, the Commission accepted the new rates for filing. Applicant and the City of Cleveland and the Sierra Club, both of

which had duly intervened herein, appealed to the Supreme Court of Ohio from the Commission's Opinion and Order of November 28, 1973. On June 11, 1975 the Supreme Court issued its decision in *Cleveland Electric Illuminating Company v. Public Utilities Commission,* 42 Ohio St. 2d (1975), affirming in part and reversing in part this Commission's Opinion and Order of November 28, 1973. This matter has now come on for consideration by the Commission pursant [*sic*] to the mandate of the Supreme Court as set forth in that decision.

APPEARANCES:

Messrs. Alan D. Wright and Harry G. Fitzgerald, Jr., 1010 Euclid Avenue, Cleveland, Ohio, and Squire, Sanders & Dempsey, by Messrs. John Lansdale, Jr., Alan P. Buchmann, and James H. Woodring, 1800 Union Commerce Building, Cleveland, Ohio 44115, on behalf of the Applicant.

Messrs. Robert D. Hart, John F. Harkins, and William Schatz, 213 City Hall, Cleveland, Ohio, on behalf of the City of Cleveland, Intervenor.

Mr. Lawrence V. Cox, Director of Law, 6161 Engle Road, Brook Park, Ohio, on behalf of the City of Brook Park, Intervenor.

Messrs. Weston, Hurd, Fallon, Sullivan & Paisley, by Mr. Jerome S. Kalur, 2500 Terminal Tower, Cleveland, Ohio, on behalf of the Sierra Club, Intervenor.

Messrs. Thompson, Hine & Flory, by Messrs. William B. Wallace and Alan R. Lepene, Special Counsel, 1100 National City Bank Building, Cleveland, Ohio, on behalf of the City of Rocky River, Intervenor.

Ms. Daisy G. Collins, 1404 East Ninth Street, Cleveland, Ohio, on behalf of The Greater Cleveland Welfare Rights Organization, Inc., Intervenor.

Mr. Patrick A. Gareau, Director of Law, 21330 Center Ridge Drive, Rocky River, Ohio, and Mr. Gerald P. Wadkowski, Special Counsel, 85 East Gay Street, Columbus, Ohio, on behalf of the Cities of Westlake and Strongsville, Intervenors.

Honorable George E. Mastics, Ohio House of Representatives, 1001 Terminal Tower, Cleveland, Ohio, on his own behalf and on behalf of his electoral district, Intervenors.

Mr. William J. Brown, Attorney General of the State of Ohio, by Mr. Charles S. Rawlings and Ms. Cheryl Hachman, Assistant Attorneys General, 111 North High Street, Columbus, Ohio, on behalf of the staff of The Public Utilities Commission of Ohio.

COMMISSION REVIEW AND DISCUSSION:

In its opinion in *Cleveland Electric Illuminating Company v. Public Utilities Commission, supra,* the Supreme Court of Ohio affirmed this Commission's Opinion and Order of November 28, 1973 in certain respects and reversed it in others. For the purposes of this Opinion and Order on remand, as will become apparent hereinafter, there appears to be no need for this Commission to discuss or act upon a number of the points set forth in the Supreme Court's opinion, since it is clear that, on any interpretation of the Supreme Court's decision, applicant is entitled to the full rate increase requested in the application.

Although the Supreme Court dealt with several rate base items, deciding some rate base issues in applicant's favor and some adversely to it, with respect to only one rate base question did it reach a conclusion substantively adverse to applicant in the sense that it would result in a reduction of the rate base found appropriate by this Commission in its Opinion and Order of November 28, 1973. This relates to the question of properly crediting the al-

lowance for working capital with an offset for customers' contributions in the form of tax accruals. In this respect, the ninth paragraph of the syllabus of the Supreme Court's opinion reads as follows:

> "9. Customers' contributions in the form of accruals for the payment of taxes which will be constant with reasonable certainty and which are available for investments in materials and supplies or for use as working capital should be used as an offset on the allowance for working capital. (*Cincinnati v. Pub. Util. Comm.*, 161 Ohio St. 395, approved and followed)."

Thus, if we were to consider this issue alone, it is apparent that the rate base as previously found by this Commission must be reduced. As the Supreme Court noted in its opinion, however, the evidence as to the amount of any such reduction is conflicting. It is apparent that the most conservative possible approach to this issue, i.e. the approach most adverse to the interests of the applicant, would be the elimination of *all* working capital from the statutory rate base. On the other hand, the Supreme Court expressly held that the value of the filled land at the applicant's Lake Shore Power Plant *is* included in the rate base There was no dispute as to the value of that property, but only as to its includability. Thus, under the Supreme Court's decision, it is plain that that value, $418,000, should be added to the value of the Company's land and land rights. This would result in a statutory rate base for the purposes of this proceeding of $1,155,717,000 as indicated by the table below:

Land and land rights	$ 37,507 (000's)
RCNLD of property	1,118,210
Working capital	- 0 -
Rate Base	$1,155,717

It will be noted that this computation does not take into consideration the decision of the Supreme Court as to the computation of the materials and supplies component of working capital which would tend to increase the rate base above that indicated. As discussed hereinafter, there is no need for the Commission to pursue its analysis of this question further at this time.

In so far as rate of return is concerned, the decision of the Supreme Court would, ordinarily, require a reevaluation of all of the components of the cost of capital which this Commission normally considers in determining a fair rate of return. Again, as will become clear hereinafter, there is no need for the Commission to make such a determination at this point. It is sufficient to note that the Supreme Court concluded that the inclusion of deferred credits at zero cost in determining a rate of return of 7.05% was unlawful. If we exclude the deferred credits component of the capital structure from the computation, holding all other elements constant, the effect upon the determination of the cost of capital is as follows:

	Percent of Total	*Cost*	*Weighted Cost*
Common	40.4	8.5	.034340
Preferred	6.8	7.4	.005032
Debt	52.8	6.5	.034320
	100.0		.073692

It will be observed that this computation does no more than eliminate the deferred credits at zero cost, restating the remaining components of capital structure as percentages of the total and, of course, developing the resulting weighted cost. No changes have been made in the assigned cost of the various components from those utilized in the staff approach originally adopted by this Commission in its Opinion and Order of November 28, 1973. Obviously,

in view of the Supreme Court's decision on the various rate of return issues, this is the computation which is most adverse to the position of the applicant. It results, as indicated, in a rate of return of 7.37%.

Application of a rate of return of 7.37% to the minimum rate base discussed above will result in an allowable dollar return in the amount of $85,176,343 which, when added to the allowable annual expenses of applicant for the purposes of this proceeding as previously determined by the Commission, would produce allowable gross annual revenue, with due regard to the income tax effect of the increase, of $319,721,729.

In its application, however, applicant requested an increase in rates which would produce allowable annual revenue of $319,473,248 (S.R. p. 8), which is less than the amount determined above. The Commission is of the opinion that the amount requested constitutes implicit acknowledgment by applicant that such revenues are sufficient to meet its normal expenses and carry on its operations [See *Dayton Power and Light Company,* Case No. 73-166-Y (February 65, [*sic*] 1975] and that the rate of return which such revenues would produce should be considered the fair rate of return for purposes of this proceeding. Accordingly, the Commission is of the opinion that there is no need for further analysis either of rate base or rate of return which otherwise might be required by the Supreme Court's decision.

The only remaining question relates to certain tariff issues heretofore determined by this Commission in its Opinion and Order of November 28, 1973. Specifically, the regulations in issue here deal with the time of access to customer premises, itemization of charges for special construction, and voltage variations, together with the fuel adjustment clause and certain promotional tariffs. In its

opinion the Supreme Court concluded that, when considering an application for a rate increase, this Commission "may not extend its inquiry to matters not put in issue by the applicant and not related to the rates which are the subject of the application." The Supreme Court, however, expressly refrained from attempting to categorize which of the five indicated matters, if any, fall within the realm of the Company's application or have an effect upon the rates. The Commission is of the opinion, and so finds, that the fuel adjustment clause and the promotional tariffs clearly "have an effect upon the rates" and the record supports the disposition made by this Commission on those questions in its Opinion and Order of November 28, 1973 which, to that extent, is incorporated herein.

The other matters referred to in the opinion of the Supreme Court in this connection present a much closer question and, if this proceeding were at a different stage it is possible that different result might be required. The record, however, reflects that the precise language in question with respect to each of these regulations was the result of discussions between the applicant and the Commission's staff and that there is evidence in the record to support the changes required by the Commission. In view of the fact that this matter has been pending before the Commission since October 7, 1971, and that there is no indication in the record that the Commission's determination on these points has been or will be prejudicial to applicant, the Commission will adopt the pertinent portions of its Opinion and Order of November 28, 1973 on these issues.

FINDINGS OF FACT:

From evidence of record in this proceeding, the Commission finds that:

1. The value of applicant's electric property used and useful for the service and convenience of the pub-

lic within the service area encompassed by this application, as of the date certain June 30, 1971, is not less than $1,155,717,000 and that, for the purposes of this proceeding on remand, no allowance for working capital will be made, resulting in a rate base for this proceeding of $1,155,717,000.

2. For the twelve month period ending December 31, 1971, the test period in this proceeding, the revenues, expenses and income available for fixed charges from the rates for electric service then being charged and collected in the area involved in this proceeding, are $268,930,886, $209,153,155, and $59,777,731, respectively.

3. This net annual compensation of $59,777,731 represents a 5.17 percent rate of return on a rate base of $1,155,717,000, which is insufficient to provide applicant with reasonable compensation for the electric service rendered to customers in the area in question.

4. The application herein constitutes a recognition by applicant that a rate of return of somewhat less than 7.37%, i.e. a rate of return which would produce the requested increase, is fair and reasonable and is sufficient to provide applicant just compensation and return on the value of the property used and useful in furnishing the service described in the application.

5. Applicant has recognized that a dollar return in the amount of $85,050,160 will provide it with reasonable compensation for the electric service rendered to customers in the territory affected by this application.

6. The annual expenses of applicant for the purposes of this proceeding are $234,423,088.

7. The gross annual revenue to which applicant is entitled for the purpose of this proceeding is the sum of the amounts set forth in Findings 5 and 6, or $319,473,248.

8. The applicant should submit tariff schedules consistent with this Opinion and Order and cancel and withdraw its presently effective tariffs.

CONCLUSIONS OF LAW:

1. Pursuant to the mandate of the Supreme Court of Ohio in *Cleveland Electric Illuminating Company v. Public Utilities Commission,* 42 Ohio St. 2d 403 (1975), the applicant should be authorized to cancel and withdraw its presently effective tariff provisions on file with this Commission and to file tariff provisions consistent with the Commisson's Discussion and Findings set forth above.

2. The effective date of the new tariffs shall be the first billing period after the Commission's approval of the tariffs filed pursuant to this Order.

ORDER:

It is, therefore,

ORDERED, That the applicant be, and hereby is, authorized to file tariffs consistent with the Discussion and Findings set forth above and to cancel and withdraw its present tariffs. It is, further,

ORDERED, That the tariff sheets authorized herein, should be submitted for approval by the Commission. Upon receipt of two (2) complete copies of said tariffs conforming to this opinion and order, the Commission will review and approve same by entry. It is, further,

ORDERED, That the effective date of the new tariff should be the first billing following Commission approval of the tariffs filed pursuant to this order. Applicant should notify each of its customer [*sic*] of the increase in rates and changes authorized herein by insert or attachment to this first billing. The proposed notice shall be submitted to the

Commission when applicant files its tariffs for approval. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

C. LUTHER HECKMAN, *Chairman*
SALLY W. BLOOMFIELD, *Commissioner*
DAVID SWEET, *Commissioner*